



THE SPEECH
OF THE LORD
CHANCELLOR OF
England, in the Eschequer
Chamber, touching the
Post-nati.



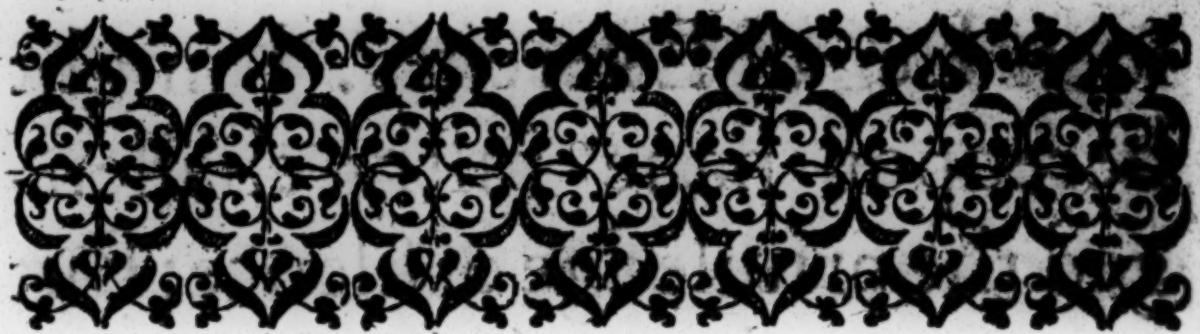
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The Right Hon^{ble}. Thomas
Earl of Haddington

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To the louing Readers.



Before I pre-
sumed to speake
in the Esche-
quer Chamber
in R. C. Case
(which is now
commonly called, the Case of
Post-nati,) I considered mine
age and infirmities, and how
long I had discontinued from

To the Readers.

such Legall Exercises. I might hereupon haue iustly challenged the priuiledge of silence: But greater and weightier Reasons ouer-ruled mee, and enforced mee to waiue the benefit of that priuiledge: For, looking into the nature of the Question then in hand, and examining the Circumstaunces, I found the Case to bee rare, and the Matter of great import and consequence, as being a speciall and principall part of the blessed and happy V-nion of great Britaine.

I heard many learned and iudicious Arguments, made by the reuerend Judges: and finding that they did not all con-

curre

To the Readers.

curre in Opinion (though the number was indeede so few , of them that differed, that in *Greeke* it woulde not make a plurall number) and that some things were by them omitted , which seemed to mee to bee both pertinent to the Matter, and necessary to bee knowne , and more proper and fit to bee spoken by me, respecting the place I hould, than by them , that did wholy binde themselues to the forme and rule of legall Argument and Discourse : I thought that I could not , in duetie, sit as a dumbe and idle hearer onelie, The Cause being iudicially depending in the high Court. of

Chan-

To the Readers.

Chancery, where I was to Judge of it according to Lawe, following the rule of mine owne Conscience, and the measure of mine owne vnderstanding, and not to be swayed with the weight of other mens opinions.

I considered also, that althogh *Silentij tutum præmium* is often true in humane policie, yet sometime, there is *Crimen Reticentie*; and therefore the Prophet said, *Væ mibi qui tacui*. And *Chrysostome* obserueth, that, *Tribus modis in veritatem peccatur*: 1. *Veritatem præ timore tacendo*: 2. *Veritatem in mendacium Commutando*: 3. *Veritatem non defendendo*. Remembering this, my Con-

Esaia 6.

science

To the Readers.

science tould mee, that howsoeuer Silence might in this Case haue excused mee of the second, yet I could not haue escaped by Silence, from offending in the first & last. And if *Festus* thought it not reason, to send a prisoner, without shewing the Causes which were layed against him, I might haue beene worthily & iustly censured, if vpon other mens arguments, and as it were *fide implicita*, I should haue pronounced my Judgement and sentence in so great a Cause, without declaring the groundes and reasons whereupon I stood. Thus, Duetie and Necessitie (for, *ratio sapienti necessitas*) were

the

To the Readers.

the causes that induced mee to speake in this rare and weightie cause, and the force of truth moued mee to speake that which I did speake, without respect of pleasing or displeasing any. And so, hauing the warrant of a sincere conscience, which is truly said to be, *veluti Comes, & Testis, & Index actionum*, I haue in the Chancerie iudged and decreed the Case for *R. C.* And the like Judgement is also giuen by the Judges of the Kings Bench, in the Assise depending in that Court. The decree and iudgement being thus passed, diuerse vnperfect Reports, and seuerall patches and pieces of my Speech

haue

To the Readers.

haue bin put in writing, & disper-
sed into many hands, and some
offred to the Presse. The Kings
M^{ie}. hauing knowledge there-
of, misliked it, & thereupon cō-
manded me to deliuer to him in
writing, the whole discourse of
that which I said in that Cause.

Thus I was put to an vnexpe-
cted new labour, to reuiew my
scribbled & brokē papers. Out of
which (according to the charge
imposed vpon me) I gathered all
which I had before spoken, & so
set it downe faithfully & plainly,
and (as neare as I could) in the
same words I vttered it; it pleased
his sacred M^{ie}. to take some view
of it, & taking occasion thereby,

to

To the Readers.

to remember the diligence of the
L. chiefe Iustice of the common
place, for the summarie report he
had published of the Judges Ar-
guments, he gaue mee in charge
to cause this to be likewife put in
Print, to preuent the Printing of
such mistaken and vnperfect re-
ports of it, as were already scat-
tered abroad.

Whatsoeuer it is, it was first
conceiued & spoken out of con-
science and duty; & is now pub-
lished in humble obediēce to my
most gracious Soueraigne. And
so I offer & commend it to your
good acceptance and fauourable
interpretation.

T. Ellefmere Canc.



Post-nati.



Y Lords, mine age,
mine infirmitie, and indisposition of health,
my decaie and weake-
nesse of memorie, and
Desuetudo, and long dis-
continuance from this maner of Legalle ex-
ercise (aboue foureteene yeares) haue bereaued
mee of the meanes and helpe that
should inhable me to speake in so great a
Case.

Post-nati.

I feare therefore that it will bee deemed presumption (if not worse) that I aduenture to speake heerein at all ; specially after so many learned and iudicious Arguments of so many graue, learned, and reuerend Judges.

To say the same that hath beeene saied, must needes be vnpleasaunt, wearisome, and loathsome to the hearers ; and not to say the same is to speake little to the purpose : for, what more can be saied than hath bene ?

Yet, for that the Case is depending in *Chancerie*, and adiourned hither for difficultie in Law, & there I must giue iudgement according to the Law; Whether the Complainant bee inhabbled, by Lawe, to maintaine his suit in that Court or not: I hould it more fitting to deliuer the reasons of my iudgement heere, where others haue beeene heard, than there, before a few, which haue not heard that which hath bene so learnedly argued, and largely debated heere.

And

Post-nati.

And therefore the Case standing thus, I will speake what I thinke : And I must say as one of the graue Judges saied, I can tell no newes ; But some old things which I haue read and obserued I will remembre, but I can not diuine , or prophesie *de futuris* ; I leaueth that as Iustice Yelverton did.

I am free and at libertie *Nullius addictus iurare in verba Magistri* , and therefore I will speake ingenuously and freely.

In the arguing of this Case, some things which are of great weight with mee, haue (in mine opinion) beene passed ouer too lightly ; and some other thinges which seeme to me but light, haue beene ouerweighed, as I thinke.

Halfe an howers time longer or shorter I meane not to striue for , and therefore I will presume on your patience, and assume to my selfe such conuenient time as others haue done : And yet I will husband time as well as I can.

I will not be abashed to strengthen my

Post-nati.

weake memorie with helpe of some scribbled papers, as others haue done : for I accept it a point of wisedome to follow wise mens Examples.

Other *Exordium*, *Insinuation*, *Protestation*, or *Preface* for the Matter it selfe, either to prepare attentiuе and beneuolent auditors, or to stirre offence or mislike against either partie, I meane not to vse ; it is fit for *Orators*, I neuer professed the *Art*, I had neuer skill in it : And it is not *Decorum* for *Judges*, that ought to respect the Matter, and not the humors of the Hearers.

The *Exordium* the Ciuilians vse in their *Sentences* I like well ; *In Deinomine Amen*, & *Deo primitus inuocato* ; other *Exordium* I care not for.

The Case.

The Case now depending in *Chancerie* which is adiourned hither, is thus.

Robert Caluine, sonne and heire apparent of James L. Caluine of Colcrosse in the Realme

of

of Scotland, an Infant of three yeares of age, borne in the said Realme of Scotland, maketh title by his Bill to a Messuage and Garden with th' appurtenances in the parish of Saint Buttolph without Bishops-gate in the Citie of London: and complaineth against *John Bingley*, and *Richard Griffin*, for detaining the Evidences concerning the same Messuage and Lands, and taking the profits thereof.

The Defendants pleade, that the Plaintiff is an *Alien*, and that in the third yeare of his Maiesties raigne of *England*, and in the nine and thirtieth yeare of his Maiesties raigne of *Scotland*, hee was borne in the Realme of *Scotland*, within the ligeance of his said Maiestie, of his Realme of *Scotland*, and out of the ligeance of our soueraigne Lord the King of his Realme of *England*.

And the Defendants say further, That at the time of the birth of the Complainant, and long before, and euer sithence, the said Kingdome of *Scotland* was, and still is, ruled and gouerned by the proper

Lawes and Statutes of the said Kingdome of Scotland, and not by the Lawes and Statutes of this Realme of *England*; And therefore the Defendants demaund Iudgement Whether the Complainant ought to be answered to his said Bill, or shall be received to prosecute the said suite against the Defendants, being for , and concerning the title of Inheritance, and euidence touching the same.

Hereupon the Complainant hath demurred in Law.

This is the speciall Case now depending in the *Chancerie*; in which , and touching all like Cases in generall, mine opinion is , and since the question was first moued hath beene , That these Post-nati are not *Aliens* to the King, nor to his Kingdome of *England*; but by their Birth-right, are liege subiects to the King ; and capable of estates of Inheritance, and freehould of Lands in *England* ; and may haue and

Maintaine as well Reall as Personall actions for the same. And that therefore the now Complainant *Robert Caluine* ought to be answered.

This opinion I did first conceiue vpon those rules and reasons in Law (as well the Common law of *England*, as the *Ciuile* law) which heereafter in the course of my speech I will remember. And in this opinion I haue beene since confirmed by many great and weightie reasons.

First, in the *Statute* made in the first yeare of his Maiesties raigne of *England*, authorizing the *Treatie* betweene the *Commissioners* for both the *Kingdomes*, it is said (as *Justice Warburton* noted well) That both the famous & ancient *Realmes* of *England* and *Scotland*, are now vnited in allegiance and loyall subiection in his royall person, to his Maiestie, and his posteritic for euer.

Here wee haue the *Judgement* of the *Parliament*, that there is a *Vnitie* in alleg-

The proceeding in the general Case of Post-nati.
Stat. 1. Iac.
19. Mart. 1603

ance

ance to one Roiall person ; And therefore I see not how wee may out of imaginarie conceipts , and by subtile distinctions straine our wittes to frame seuerall allegances to one and the same Roiall person, contrary to so plaine a declaration made by Parliament.

The Procla-
mation,
2. Iacobi 20.
Octobr, 1604.

Next followeth his Maiesties Proclama-
tion 20. Octobris 1604. by which hee
assumed to himselfe the Name and Stile of
King of great Britaine : In which Proclama-
tion, among many other weighty reasons,
this is added for one, *W^e haue received from
those that bee skilfull in the Lawes of the Land,
That immediately upon our succession, diuerse of
our auncient Lawes of this Realme are ipso
facto expired; as namely, that of Escuage,
and of the naturalization of the Subiects.* This
was not done sodainely nor lightly ; but
vpon graue, and serious deliberation, and
aduise : And therefore seemeth to mee to
be a Matter of great importance, and not
to be lightly regarded.

The sametwentieth of October these Commissioners began their Treatie. Of the graue and iudicious Course which they held, in debating of the Matter then propounded, I will forbear to speake: But for this point of Naturalization now in question, their resolution in the end was thus:

That it shall be propounded to both the Parliaments at the next Sessions, that an Act be made containing a declaration, as followeth: That all the Subjects of both the Realmes, borne since the decease of Elizabeth the late Qu. of *England* of happy memorie, and al that shalbe borne hereafter vnder the obedience of his Maiestie, and his roiall Progeny, are by the common Lawes of both the Realmes, and shal be for euer, inhabbled to obtaine, succeed, inherite, and possesse all *Lands, Goods, and Chattels, &c.* as fully, and amply as the Subjects of either Realme respectiuely might haue done, or may doe in any sort within the Kingdome where they were borne.

The Commissioners authorized by parliament, did begin 20. Octob. and did continue vntill 6. Decemb. 2. Iacobis.

The resolution of the Commissioners.

This, after long debating, and graue, and deliberate consideration, was, in the end, the resolution of the greater part of the Commissioners, not one openly gainsaying it. And diuerse of the principall Judges of the Realme were present at all times when the point was debated. And herein I note the wise & iudicious forme of that resolution, which was not to propound to the Parliament the making of a new Lawe; but a declaration of the common Lawes of both the Realmes in this question.

Now, if we consider who these Commissioners were, what Lords of the higher House, and what persons of the common House, selected of all degrees, most eminent for their learning and iudgement, aswell in Ciuile and Common Law, as in knowledge, and experience other waies, being assisted by the graue Judges of the Realme: If this, I say, be well considered, then this Resolution must be accompted and esteemed as a matter of

great

great and weighty importance, and much to bee regarded in the deciding of this question.

According to this Act of the Commissioners, the Case was propounded in the next Session of Parliament. In the higher House, the Judges were required to deliuer their opinions. There were then cleauen Judges present; whereof tenne did with one vniiforme consent affirme the Lawe to be; That the *Post-nati* were not Aliens, but naturall Subjects (one onely dissenting.) After this, the Question was debated in a solemne Conference betweene both the Houses of Parliament at seuerall times, and at great length, and with much liberty. Nothing was omitted that Wit or Art could inuenient to obiect against this opinion; And that was done by men of great learning, and singular iudgement in the Common Lawe, and Ciuite Lawe; and by some other Gentlemen of the Common House, of rare

The Judges
opinion in
Parliament.

gifts for their learning, knowledge, elocution and experience.

At this Conference the Judges were present ; who , after they had heard all that was , or could be said , did confirme their former opinions , which they had before deliuered in the higher House : Three of the chiefe of them declaring their reasons, and all the rest (sauing one alone) concurring in the same . So, here was now a generall resolution by all the Judges of the Realme (one excepted) and that deliuered not priuately , but in Parliament ; which without more adoe had beene sufficient to haue decided and determined this question.

The force and
strength of the
Kings proclama-
tions.

Touching the Proclamation, it was discreetly and modestly saied by a learned Gentleman of the lower House , That it was of great respect , and much to be regarded ; but yet it was not binding , nor concluding : for, Proclamations can neither make , nor declare Lawes. And be-

sides,

sides, that this Proclamation was not grounded vpon any Resolution of the reuerend Judges; but vpon the opinion of some skilfull in the Lawes of this Land.

Of the strength of Proclamations, being made by the King, by the aduise of his Counsell and Judges, I will not discourse, yet I will admonish those that bee learned and studious in the Lawes, and by their profession are to giue counsell, and to direct themselues, and others, to take heede that they doe not contemne or lightly regard such Proclamations.

And to induce them thereunto, I desire them to looke vpon, and consider aduisedly these few Proclamations, Prouissons, or Ordinances, which I will point out vnto them; and of what validitie and force they haue beeene houlden to bee in construction of Lawe, albeit they be neither Statutes, nor Acts of Parliament.

M.4. H.3. in Dower, the Defendant pleaded, Quod petens est de potestate Regis Franciae, & residens in Francia; Et prouisum est

Fitzh. Dower.
179.

à Consilio Regis, quod nullus de potestate Regis Francie respondeatur in Anglia antequam Angli respondeantur de iure suo in Francia. This the Plaintif's Attorney could not denie; and thereupon the Judgement was, Ideo sine die.

Anno 20. H.3. certaine Prouisions and Ordinances were made which were called *Prouisiones Merton*, where the King assembled his Archbishops, Bishops, Earles, and Barons for the Coronation of the King, and his wife *Queene Elenor*; and the words be, *Prouisum est in Curia Domini Regis apud Merton coram VVilibelmo Cantuariensi. Archiepiscopo, & Coepiscopis, Suffraganeis suis; Et coram maiori parte Comitum & Baronum Angliae ibidem existentium pro Coronatione ipsius Domini Regis & Helionoræ Reginæ, pro qua omnes vocati fuerunt: Cum tractatum esset de Communi utilitate Regni super articulis subscriptis. Ita prouisum fuit & concessum, tam à prædictis Archiepiscopis, Episcopis, Comitibus, & Baronibus, & alijs. De viuis primò &c.*

Fitzherbert citeth a Prouision made *Anno 19. H.3.* in these words, *Et prouisum fuit coram Domino Rege, Archiepiscopis, Episcopis, Comitibus, & Baronibus, Quod nulla Assisa ultime præsentationis de cætero capiatur de Ecclesijs, Præbendatis nec de Præbendis.* This Prouision was allowed and continued for Lawe, vntill *VV. 2. Anno 13. Edw. 1. ca. 5.* which prouides the contrary by expressie words.

Anno 6. Ed. 1. the King and his Judges made certaine Explanations of the Statute of Gloucester, which are called, *Explanationes statuti Gloucestricæ*: And these be the wordes, *Postmodum per Dominum Regem & Iusticiarios suos factæ sunt quædam Explanatio-nes quorundam articulorum superius positorum.* Which Explanations haue euer since been receiued as a Law.

There is a Proclamation by King *Ed. 3.* bearing *Teste at VVestminster Anno 15. Ed. 3.* And Judge Thorpes opinion *Pa. 39. E. 3. 7.* both which I will now forbeare to report, and wish the Students to reade the same

Fitzherbert
N. 32.

Anno 6 Ed. 1.
Explan. stat.
Gloucestr.

A Proclamati-
on. 15. Ed. 3

in the printed Bookes, where they shall see both the effect and the reason and the cause thereof; They are worth their reading, and may informe and direct them what judgement to make of Proclamations.

How the Judges opinion delivered in parliament ought to be regarded.
Object.

Touching the opinion of the Judges, some haue obiected (yet modestly, and I suppose, according to their conscience and vnderstanding) That there is not like regarde to be had of Judges opinions giuen in Parliament, as ought to bee of their Judgements in their proper Courts and Seates of Iustice: for, in those places their Oath bindeth them; but not so in the other.

Responſ.

1. To this I answer: The reuerence, and worthinesse of the men is such, as is not to bee quarrelled and doubted of, if there were no Oathe at all: for, if men of so great and eminent places feare not God and his Judgements, cuen out of a

religi-

religious conscience, which is *Fractum ante peccatum, & flagrum post peccatum*, it may be doubted that the externall ceremonie of adding a Booke will little availe.

2 Their Oath doth bind them as much in the Court of Parliament, as in their proper Courts: for, that is the supreme Court of all; and they are called thither by the Kings Writ, not to sit as Tell-clockes, or idle hearers; but *quod personaliter intersitis nobiscum, ac cum cæteris de Consilio nostro super dictis negotijs tractaturi, vestrumq; Consilium impensuri*: And those Negotia be *Ardua & Vrgentia negotia Regni &c.* And their Oath, amongst other things, is, That they shall counsell the King truely in his businesse.

3 This Exception may serue against the Judges, as well in Cases when they sit and giue Judgement, as Iustices of Assises, *Nisi prius, Oyer and Terminer, and Gaole Delivery*, as in this Case of Parliament: for, there they haue none other Oath but their generall Oath.

4 It becomes vs to esteeme of Judges now, as our forefathers esteemed them in times past ; for as they succeede them in Time and Place (I thanke God , and the King, I haue neither cause to feare any for displeasure, nor to flatter any for fauour: wherefore I will neither be afraid, nor abashed to speake what I thinke:) I say therefore, that as our Judges now succeed the former Judges, in Time and Place; so they succeede them , and are not inferior to them in Wisedome, Learning, Integrity , and all other iudicious and religious Vertues.

The iudgement of the parliament, of Judges opinions deliuered in parliament.

Then let vs see what the wisedome of Parliaments in times past attributed to the Judges opinions declared in Parliament ; Of which there bee many Examples ; but, I will trouble you but with two or three.

I wil not remember Richard the seconds time (of which some of our Chroniclers doe talke idly , and vnderstand little) where power and might of some potent

persons

persons oppressed iustice, and faithfull Judges, for expounding the Law soundly, and truely. The first that I will remember, is this.

In the Parliament 28. H. 6. 16. *January*, the Commons made suite, That *W. de la Poole* Duke of *Suffolke* should be committed to prison for many treasons and other hainous crimes committed by him. The Lords in Parliament were in doubt what answer to giue; They demanded the opinion of the Judges: Their opinion was, That hee ought not to be committed; And their reason was, for that the Commons did not charge him with anie particular offence, but with generall slauders and reports; And therefore because the Specialties were not shewed, he was not to bee committed. This opinion was allowed; And thereupon 28. *January*, the Commons exhibited certaine speciall Articles against him, *viz.* That hee conspired with the French King to inuade

the Realme &c. And thereupon hee was committed to the Tower.

2 In the parliament *Anno 31. H.6.* in the vacation (the parliament being continued by prorogation) *Thomas Thorpe* the Speaker was condemned in a thousand pounds dammages in an action of Tres-passe, brought against him by the Duke of Yorke, and was committed to prison in Execution for the same. After, when the parliament was re-assembled, the Commons made suite to the King and the Lords, to haue *Thorpe* the Speaker deliuered, for the good exploite of the Parliament; whereupon, the Duke of Yorkes Counsell declared the whole case at large. The Lords demanded the opinion of the Judges, whether, in that case, *Thorpe* ought to be deliuered out of prison by priuiledge of Parliament: The Judges made this aunswere, That they ought not to determine the priuiledge of that high Court of parliament; But for

the declaration of proceeding in lower Courts, in cases where Writtes of *Super-
seideas* for the priuiledge of the parliament be brought vnto them, They answered: That if any person that is a Member of the Parliament be arrested in such cases as bee not for treason or felonie, or for suretie of peace, or condennation had before the parliament, it is vsed that such persons be released ; and may make Attorney, so as they may haue their freedome and libertie, freely to intend the parliament. Hereupon it was concluded, That *Thorpe* should still remaine in prison according to the Law, Notwithstanding the priuiledge of parliament, and that he was the Speaker. Which resolution was declared to the Commons by *Walter Moyle*, one of the Kings Serieants at Law. And then the Commons were commaunded in the Kings name, by the Bishop of *Lincolne* (in the absence of the Archbishop of *Canterbury* then Chauncellor) to choose another Speaker.

3 In the parliament An. 7. H. 8. a question was moued, whether spirituall persons might be conuicted before temporall Judges for criminall causes; There, sir John Fineux and the other Judges deliuered their opinion, that they might and ought to be so. And their opinion was allowed, and maintained by the King and the Lords: And D. Standish, who before had houlden the same opinion, was deliuered from the Bishops. And it is worth the noting, what words passed in that Case betweene the Archbishop of Canterbury, and that worthie Judge Fineux.

Writs of Errour sued in parliament.

4 If a writte of Errour bee brought in parliament vpon a Iudgement giuen in the Kings Bench, the Lords of the higher House alone (without the Commons) are to examine the Errours; But that is by the aduise and counsell of the Judges, who are to informe them what the Law is, and so to direct them in their Iudgement. And if the Iudgement be reuersed,

then

then commaundement is to be giuen to the Lord Chancellour to doe Execution accordingly. And so it was in *Anno 17. R. 2.* in a writte of Errour brought in parliament by the Deane and Chapter of *Lichfield*, against the Prior and Couent of *Newport-Panell*, as appeareth by the Record. But if the Judgement bee affirmed, then the Court of the Kings Bench are to proceede to Execution of the Judgement, as it appeareth in *Flowerdeunes Case P. 1. H. 7.* fol. 19. But it is to bee noted, that in all such writtes of Errour, the Lords are to proceede according to the Law; and for their Judgement therein they are informed and guided by the Judges; and doe not follow their owne opinions or discretions otherwise.

This extravagant Discourse touching Proclamations, and Judges opinions deliuered in parliament, and how they ought to be regarded, I haue thought materiall and necessarie, both in respect

of the time wherein we liue, and the Matter which we haue in hand: And these be things which I thinke haue beeene too lightly passed ouer: But if you condemne it as impertinent, I must then confess I haue presumed too much vpon your patience; I pray you beare with mee, it is but my labour lost, and a little time misspent, if it seeime so vnto you: You are wont to pardon greater faults; Call it either a *Passe-time*, or *Vast-time*, as pleaseth you. Now, to returne to the Case we haue in hand.

The processe
and forme of
proceeding in
the Case of R.
C. now inque-
stion.

The generall Question hauing had this passage (by Proclamation, by Commission, and by debating in Parliament) remaineth yet without conclusion or judgement: And as euery man abounds in his owne sence, so euery one is left to his owne opinion; Specially those that were not satisfied with the graue Resolution of the Judges in Parliament, which (although some may tearing & accompt

as bare opinions) I must alwaies valem, and esteeme as a reall and absolute Judge-
ment. Now, I say, this generall *Questi-*
on is reduced to two particular Cases, and
is iudicially depending in two the highest
Courts of iustice in this Realme; and that
is by one Complainant against seuerall
Defendants for the freehoulde and inhe-
ritance of seuerall parcells of Land; and
(as M. Solicitor said well) is a Case, not
fained, nor surmised, but a true Case be-
tweene true parties: And being *Questio*
iuris, non facti, is by both these Courts
adiourned hither to be decided, and de-
termined by all the Judges of *England*, as
the rarenesse of the Case, and the weight
and importance of it, both for the pre-
sent and the future doth require.

And the Case being of this nature and
qualitie, it is not amisse to obserue the
proceeding in it: for, it is woorth the ob-
seruing, and not to bee forgotten. The
Defendants counsell, men of great learn-
ing, and in their profession inferiour to

none of their qualitie and degree , men conuersant and wel exercised in the Question , and such as in the great conference in parliament, most of them were specially selected & chose (for so they wel deserued) as most sufficient, able, and fit, as well for Learning and Knowledge, as for all other giftes of Witte and Nature, to handle so great and rare a Question. And although it hath pleased them of their good discretion to vse the paines but of a few in the debating and arguing of the Case at the Barre : yet no doubt that was done vpon mature deliberation and conference with all the residue : And whatsoeuer the Spiri-
rites , the Learning , the Wisedome, and Knowledge of all the others , vpon long studie could affoorde , was put into the mouth of those few to serue as Organs and Instruments to deliuer it vnto vs; which they haue so well and sufficiently performed, that they deserue great praise and commendation : For, in my poore o-
pinion , the witte of man could not de-

uise to say more touching this Question in Lawe than they haue said. And whatsoeuer hath beene sithence spoken for that part, it is for the Matter, but the same in substance, which the counsel at the Barre did deliuer; Though it hath beene varied in forme, and amplified with other wordes and phrases, and furnished with shew of some other strained Cases and authorities.

The handling of it by the learned and reuerend Judges, hath beene such, as it may appeare to the world, that euery one hath spoken his owne heart and conscience; and hath laboured by long studie to search out the Law and the true reason of the Law in this rare Case; and so they haue spoké, as *Coram Deo & Angelis*: None which desire to seeme popular; for nothing ought to bee *tam popularis quam veritas*: None to seeme to be Time-servuers, or Men-pleasers: for the King (whome vnder God they serue) being *Pater patriæ*, and soueraigne head of both these great

vnited Kingdomes, is to them both like as the head of a naturall body is to all the Members of the same, and is not, nor can not be partiall more to onethan to an other. He deliteth in trueth, and desireth it ; and without trueth hee cannot bee pleased. Hee ruleth by his Lawe, and commaundeth his Judges to minister to all his Subiects Law and Iustice sincerely and truely ; and equally and indifferent- ly, without any partiall respect.

It was neuer seene, but that in all rare and difficult Cases, there haue beene diuersitie of Opinions ; but yet without breach of Charitie, which is the Bond of Vnitie. So it hath happened in this Case. The Case hath beene argued at large by foureteene learned Judges ; twelue of them haue concurred in iudgement, but vpon seuerall reasons : for, as many waies may leade to one end of the iourney, so diuerse and seuerall reasons may conduce to one true and certaine conclusion.

And here I may not omit the woorthie memorie of the late graue and reuerend Judge, Sir *John Popham*, chiefe Iustice of the Kings Bench deceased (a man of great wisedome, and of singular learning and iudgement in the Law) who was absolutely of the same opinion, as he often declared, as well in open Parliament, as otherwise.

The Apostle *Thomas* doubted of the Resurrection of our Sauiour Iesus Christ, when all the rest of the Apostles did firmly beleue it : But that his doubting confirmed, in the whole Church, the Faith of the Resurrection.

The two worthie and learned Judges that haue doubted in this Case, as they beare his Name, so I doubt not but their doubting hath giuen occasion to cleare the doubt in others ; and so to confirme in both the Kingdomes, both for the Present and the Future, the truth of the Judgement in this Case.

Thus, my Lords, haue you hitherto nothing from me but *Amen*, to that which all the judges (sauing two) haue said ; and much more you cannot expect from mee: Yet, since I must giue Iudgement in this Case ; and I said in the beginning, that I would render the reasons of my Iudgement : (for that is the course of argument I must houlde) I will now deliuier vnto you, what are the speciall and principall reasons that first haue induced mee , and still moue mee to houlde the opinion that I doe : And as I goe, I will indeuour to cleare some doubts and questions, that partly in the conference in Parliament, and partly otherwise, I haue heard made; not onely touching this Case it selfe , but also touching the forme and maner how it is to be decided and iudged.

How this Case
is to be ind-
ged, and by
what Law.

The Case is rare , and new (as it hath beeene often said) it was neuer decided, *Terminis terminantibus* ; It was neuer iudged by any Statute Law , which is a po-

sitive

sitive Law; nor by Judgement of the Judges of the common Law.

Now, the first Question is (as some would haue it) How it is to be Iudged? and by what Law? and haue wished that it might haue staied vntill the Parliament, and so bee decided by Parliament. They that make this doubt, I will let them demurre, and die in their doubts: for, the Case being adiourned hither before all the Judges of *England*, is now to be iudged by them according to the common Law of *England*; and not tarry for a Parliament: For, it is no transcendent Question, but that the common Lawe can and ought to rule it, and ouer-rule it, as Iustice *W*illiams said well.

But then this Question produceth another; That is, What is the common Law of *England*? Whether it be *Ius scriptum*, or *non scriptum*; and such other like niceties: For, wee haue in this age so many Questionists; and *Quo modo*, and *Quare*, are so common in most mens

What is the
common Law
of England:
and whether it
be *Ius scriptum*.

Questionists

mouthes,

mouthes, that they leaue neither Religion, nor Lawe, nor King nor Counsell, nor Policie, nor Gouernment out of question.

And the end they haue in this Question, What is the common Lawe? is to shake and weaken the ground and principles of all gouernement: And in this particular Question of the Law of *England*, to ouerthrow that Law whereby this Realm hath many hundred yeeres beene gouerned in all honour and happiness: or at least to cast an aspersion vpon it, as though it were weake and vncertainte. I wil therefore declare mine opinion in this point plainly and confidently, as I thinke in my conscience, and as I finde to be sufficiently warranted by auncient Writers, and good authorities vnde of all exception.

The common Law of *England* is grounded vpon the Law of God, and extendes it selfe to the originall Law of Nature, and the vniuersall Law of Nations.

The ground
of the com-
mon Law.

When

When it respects the Church, it is called *Lex Ecclesiae Anglicanæ*, as *Magna Charta ca. 1. Ecclesia Anglicana habeat omnia sua iura integra & illæsa*.

When it respects the Crowne and the King, it is sometimes called *Lex Coronæ*, as in *Stat. 25. Edw. 3. ca. 1. Lex Coronæ Angliæ est & semper fuit &c.* And it is sometimes called *Lex Regia*, as in *Registro fo. 61. Ad iura Regia spectat: And, Ad Conservationem iurium Coronæ nostræ, & ad iura Regia ne depereant &c.*

When it respects the common subiects, it is called, *Lex Terræ*; as in *Magna Charta ca. 29. Nisi per legale iudicium parium, vel per legem Terræ*.

Yet, in all these Cases, whether it respects the Church, the Crowne, or the Subiects, it is comprehended vnder this generall tearme; The common Lawes of *England*: Which although they bee for a great part thereof reduced into writing; yet they are not originally *Leges scriptæ*.

This I learned of the late Lord Trea-

The common
Law is not
originally Lex
scriptæ.

surer *Burleigh* (whose Honourable memorie *England* can neuer forget) and hearing it from him, I indeuored by my priuate studie to satisfie my selfe thorowlie in it. And, whosoeuer shall well consider the Lawes of *England*, which were before the Conquest (whereof wee haue some Remenants, and Patches) or since the Conquest vntill *Magna Charta, Anno 9. H.3.* will make little doubt of it.

In *H.2.* time, *Glanuile* writeth thus, *Leges Anglicanas licet non scriptas, leges appellari non videtur absurdum.*

And in *H.3.* time *Bracton* writeth thus; *Cum autem ferè in omnibus Regionibus vtantur legibus & iure scripto, sola Anglia vsa est in suis finibus, iure non scripto & consuetudine; in ea quidem, ex non scripto Ius venit, quod vsus comprobauit.*

But I may not agree with *Bracton*, that *Sola Anglia vsa est iure non scripto*: For I find that the grauest, and the greatest learned Writers of the *Ciuile Lawe*, both auncient

and

and of this our time, doe hould the samie opinion , touching the *Ciuile Lawe* it selfe; for thus they write : *Ex non scripto Ius venit, quod usus approbavit.* And thus ; *Ius Ciuile dictum ex non scripto natum est.* And, *Ius non scriptum dicitur Consuetudo, non quod scripto perpetuo careat, hoc enim falsum est.* Nam & *Consuetudines in memoriam constantiorem reducuntur in Scripturam, ut cætera quoque quæ fine scriptura perficiuntur : Sed non scriptum ius est : id est, quod à scriptura vis eius non cœpit nec pendeat.* So , hereby it may appeare how in this we concurre with the *Ciuile Law.*

But hereupon these Questionists moue an other Question , viz. If the common Law be not written, how then shall it be knownen ?

How the common Law of England may be knowne.
Obiect.

To this I answer ; It is the common custome of the Realme (as Bracton saith, *Ius venit. quod usus comprobavit :*) And it

Repons.

standeth vpon two maine pillers & principall parts , by which it is to bee learned and knowen.

Maximes and
Principles.

The first, is certaine knowne Principles and Maximes, and ancient Customs, against which there neuer hath been, nor ought to bee any dispute. As in Cases of Subjects ; an estate in Fee-simple, for life, for yeeres, Dower, Curtesie, &c.

In Cases of the Crowne, the Female to Inherite: The Eldest sole to be preferred: No respect of Halfe Blood : No Tenant in Dower , or by the Curtesie of the Crowne: No disabilitie of the Kings person by Infancie &c.

Responsa pru-
dentum.

The second is, where there be no such Principles , then, former Iudgements giuen in like Cases : And these be but *Arbitria Iudicium* , & *Responsa Prudentum*, received, allowed, and put in practise and execution by the Kings authoritie.

Of

Of these Bracton speaketh; *Ego H. de Bracton animum erexi ad vetera Iudicia iustorum perscrutanda; facta ipsorum, Consilia, & Responsa in unam summam redigendo compilauit.*

And before the Conquest, King Ethelbert caused a Booke to bee made, which was called *Decreta Iudiciorum*: And King Alured did the like, as Master Lambard a iudicious and learned obseruer of Antiquities, doth remember.

Of these also the Judges speake H. 33. H. 6. Moyle, fo. 8. *W*e rule the Law according to the auncient course. Ashton, fol. 9. All our Lawe is guided by vse, and by Statute. And Prysot saieth, fol. 9. There cannot be a positive Lawe, but such as was iudged or made by Statute. Wherein I note also that hee equakleth a Judgement with a Statute.

In 36. H. 6. fol. 25. Fortescue reasone thus; *The Lawe is as I haue said, and so hath beeene alwaies since the Lawe began.*

In 37. H. 6. f. 22. Ascue reasons thus; *Such a Charter hath beeene allowable in the time of our*

*Lambard in ex-
plicatione verbi
Hyde.*

Predecessours, which were as sage and learned as we be.

In H.4.Edw.4.fol.41. Markham reasoneth thus ; *It is good for vs to doe as it hath beene vsed before this time, and not to keepe one way one day for one partie, and another day the contrary for the other partie : And so the former Precedents be sufficient for vs to follow : And Judgement was giuen accordingly.*

Anno 36.H.6.

And in the former Case 36.H.6. *Forescue saith further ; Wve haue many Courses and Formes which be houlden for Law.*

Also euerie one of these foure principall Courts, The Chancery, Kings Bench, Common-plees, and Eschequer, haue in many things seuerall courses and formes which are obserued for Law, and that not onely in that proper Court, but also in all Courtes through the Realme ; whereof many Examples bee remembred in the Case of the Mines in *Plowdens Commentaries.*

In novo casu nouum remedium.

3. But if there bee no such former

Judge-

Judgements, nor direct Examples or Precedents, then this Rule hath a further extention, which is this.

There is a Rule in the common Law, That *in nouo casu nouum remedium est apponendum*. Et concordent *Clerici de Breue faciendo*, ita quod nullus recedat à *Cancellaria* sine remedio: For the *Chauncerie* is properly *Officina Iustitiae & Æquitatis*; where all originall writs (which in ancient times were the Grounds of all Suites) are deuised and framed. And these *Clerici* were graue and ancient men; skilful, and long experienced in the course of the *Chauncerie*; and called *Clerici de prima forma*: And of late time *Magistri Cancellariae*; who in new and strange cases, besides their owne knowledge and experience, had oftentimes conference with the graue Judges for the deuising and framing of new Writtes when neede required. And this I take to bee the same which is in the Statute *W. 2. ca. 24.* Et quotiescumque de cætero euenerit in *Cancellaria*, quod in uno casu

St. W. 2. ca. 24.
Anno 13. Ea. 1.

repe-

reperitur breue, & in consumili casu, cadente sub eodem iure & simili indigente remedio, non reperitur, Concordent Clerici de Cancellaria in breui faciendo, vel atterminent quærentes in proximum Parliamentum: Et scribantur casus in quibus concordare non possunt, & referant eos ad proximum parliamentum: Et de consensu Iurisperitorum fiat Breue, ne contingat de cætero, quod Curia Regis deficiat conquerentibus in Iusticia per quirenda.

Wherein I note these three things: First, The Clerkes are to agree; and if they agree, that is an end, and standes for Lawe, and then no referment to the Parliament. Secondly, If the Clerks agree not, and so the case be referred to the Parliament; Then *De Consensu Iurisperitorum fiat Breue*; So *Consensus Iurisperitorum* is the Rule, & not the multitude of vulgar opinions. The third is, That Iustice faile not them which complaine: Which will often faile, if you stay vntill a Parliament: For Parliaments are not to be called for the wrong of a few priuate Subjects; but for

the great and vrgent affaires of the King and the Realme.

I finde also a like Rule in the Ciuite Lawe ; *Vbi non est directa lex standum est arbitrio Iudicis, vel producendum ad similia.* And another saith , *De similibus ad similia iudicium & argumentatio recipiuntur.*

4. Besides these, there is an other generall and certaine Rule in the Ciuite Lawe, which I reserue to the last parte of that which I meane to speake in this Matter.

So, leauing that vnto a more proper place , I will hereupon conclude , That if there bee no former Judgements , nor Examples , nor Precedents to bee found, then *Concordia Clericorum*, and *Arbitrium Iudicium* is to seeke out the true and solide reason ; and thereupon to ground their Judgements in all new cases : For it was truely said by a learned Gentleman of the lower House , *Deficiente lege recurrendum est ad consuetudinem : Deficiente consuetudine re-*

Vbi non est directa Lex, &c.

Rex solus iudicat, &c.

currendum ad rationem. And so from the Judges wee shall haue *Responsa prudentum* to decide all such new cases and questions. And according to this Rule, all such new doubts and questionis haue been resolued and decided by the graue Judges in former times.

A request to
the professors
of the ciuile
Lawe.

But here, before I proceede further, I am to make a suite, which is this:

That whatsoeuer I haue spoken, or shall happen to speake of the *Ciuile Lawe*; or whatsoeuer I shall cite out of any Writer of that Law, I pray fauour of my Masters that profess it. I acknowledge that Law to bee ancient and generall in many parts of the world; and I reuerence the professors of it, as men of great learning, wisedome, and iudgement. I profess it not; I haue learned little of it; but in that little I haue found that in the reall and essentiall partes of Justice, the Ciuile and common Lawe doe in many things concur, though they differ much in the

forme and maner of proceeding . And that which I shall haue occasion to produce of that Law , will bee to shew how the common Law and Ciuile doe agree in one reason and iudgement in those things which I shall speake of.

Yet I must take liberty to say , That neither in *Spaine*, nor in *France* (those two great Monarchies) it is not generally receiued nor allowed as a concluding and binding Law.

They take there the reason of it onely as a direction to their proceeding and iudgement : But to produce or alleadge it as a concluding or binding Law, was no lesse than *Capitis pæna*.

This I make not of my selfe; for , besides common practise and experience, I haue an honest and substantiall witnessse, Master *Adam Blacwood* a Scottishman , a man of singular learning in the Ciuile Lawes , who defendeth in like maner the Lawes of *Scotland* , as appeareth in his learned Booke intituled *Pro Regibus Apo-*

Blacwood ca. 10

logia, written by him against a seditious Dialogue or Libell made by George Buchanan, *De iure regni apud Scotos*, where hec tells him, *Aliud Sceptrum aliud plectrum*. But it is not amisse to recite his owne wordes, which are thus; *Philippus cognomento Pulcher, cùm Lutetiae supreme iurisdictionis curiam institueret, eam Romano iure solutam esse declarauit: in eamque sententiam vetus extat eius Curiæ decretum, ne causarum patroni Romanarum Legum auctoritatem patriæ legibus opponant. Sed cùm ille bono & aequo niti videntur & probabilem utilitatis publicæ causam contine, nos earum utimur haud imperio, sed ratione, cui omnes homines naturæ præscriptio subiiciuntur. Quin et si quid aduersus rationem legum Romanarum perperam ac temerè iudicatum est, id earum multis pœnis haud aestimatur, sed vel Principis, vel superioris magistratus arbitratu. Nam cùm in publici muneris partem admittimur, & conceptis verbis inauguramur, solemnni sacramento regiarum & municipalium legum atque morum obseruationem, nulla Romani juris mentione, spondemus. Apud Hispanos ca-*

pitis poenam ijs indictam legimus qui Romanarum legum auctoritatem vel in foro laudarent, vel in puluere scholastico profiterentur. Sed si quid occurreret patrijs legibus ac moribus indefinitum quod iudicant religionem adferret, unicum erat eximendo scrupulo regis consulendi remedium. Alaricus Tolosæ regnans idem Gothis imperauit, vt si quis aduersus ipsius leges, Ciuite Romanorum ius citaret, temere factum morte lueretur.

Now to returne to that which I haue touched before, I say, that when there is no direct Lawe, nor precise Example, we must Recurrere ad rationem, & ad responsa prudentum : For, although Quod lego, non credo, may be a true and certaine rule in Diuinitie; yet for interpretation of Lawes, it is not alwaies so : For wee must distingh betweene fidem moralem, and fidem diuinam, or else wee shall confound many things in the ciuile and politike gouernement of Kingdomes and States. For, the first Precedent which we haue now, had no precedent when it began ; But as Tacit

Recurrend. ad
Rationem, &c.

Quod lego
non credo.

tus saith, *Quæ nunc vetustissima creduntur nōna fuerunt, & quod hodie exemplis tuemur, inter exempla futurum est.* And to those that hould, that nothing is to bee done but by former examples, *Horace speaketh thus;* *O imitatores seruum pecus:* And *Cicero* saith, *Non exempla maiorum querenda, sed consilium est eorum à quibus exempla nata sunt explicandum.*

Thus hath Iustice beene duely administered in *England*, and thereby the Kings haue ruled, the people haue beene gouerned, and the Kingdome hath flourished for many hundred yeeres; and then no such busie *Questionists* mooued any quarrell against it.

Exposition of
Statutes.

Thus haue all doubts growing vpon *Magna Charta*, and *Charta de Foresta*, made in King *Henry* the thirds time, and vpon the Statutes of *West. 1. West. 2. West. 3.* and many other Statutes made in *Ed: 1. time*: And vpon *Prerogativa Regis*, and many other Statutes made in *Ed: 2. time*; beeinge from time to time ex-

pounded ; and so of later times, the Statutes of Fines, of Uses, of Willes, and many moe.

Thus also haue all doubts and Cases, whereof there was no Statute or positie Law, beene alwaies expounded : for such are most of the cases which wee haue in our Yeere-Bookes, and Bookes of Reports, which are in effect nothing but *Responsa prudentum*, as Iustice Crooke did truely say.

Vpon this reason it is, that some lawes, as well Statute Law, as common Law, are obsoleete and worne out of use: for, all humane Lawes are but *Leges temporis*: And the wisedome of the Judges found them to be vnmeete for the time they liued in, although very good and necessary for the time wherein they were made. And therefore it is said, *Leges humanae nascuntur, & moriuntur, & habent ortum, statum, & occasum.*

By this Rule also, and vpon this reason it is, that oftentimes ancient Lawes are

Exposition of Lawes.

Lawes obso-
lete.

Lawes chan-
ged.

changed.

changed by interpretation of the Judges, as well in Cases criminall as ciuile.

In criminall cases the lawe was *Voluntas reputabitur pro facto*; but it is not so now, sauing in Treason onely.

In an appeale of Maime Britton fol. 48. saith, *Soit le Judgement, que il perde autiel member, come il auer tolle a le plaintife*; but it is not so now.

In auncient time, one present, aiding, comforting, and assisting to a murder, was taken to be no principall, but an accessorie, as it appeareth M. 40. Edw. 3. fol. 42. & 40. li. *Aff.* p. 8. & p. 25. But now in that case hee is iudged a principall. And so it was ruled by all the Iustices M. 4. H. 7. 18. and so *Plowden* affirmeth the Lawe to be, in his *Commentaries* fol. 99. & 100.

In ciuile causes in ancient time, the lawe was houlden, That he in Remainder in Taile could not haue an action of Waste, nor bee receiued vpon default of Tenant for life: But afterwards, the Lawe was often iudged otherwise; and so is

the

the common experience and practise at this day.

In *Anno 40. Ed. 3.28. Fynchden*, chiefe Iustice of the common place, saith, that in ancient time the Vicar could not haue an Action against the Parson ; But hee saith the contrarie is vsed at this day, which is the better.

In ancient time a Disseisee could not enter vpon the feoffee of the Disseisor, for sauing of the warrantie ; but for many yeeres the Lawe hath beene houlden otherwise, and so the common practise yet remaineth.

By this Rule it is also, that words are taken and construed, sometimes by Extension; sometimes by Restriction; sometimes by Implication; somtimes a Disiunctiue for a Copulatiue ; a Copulatiue for a Disiunctiue ; the present tense for the future; the future for the present; sometimes by equity out of the reach of the wordes; sometime words taken in a contrary sence; sometime figuratiuely, as *Continens pro con-*

Construction
of words.

tento, and many other like : And of all these, examples be infinite, aswell in the Ciuite lawe as Common lawe.

Judges con-
sulted with
the priuie
Counsell,

And oftentimes the reuerend Judges haue had such a graue regard in their proceeding, that before they would resolute, or giue iudgement in such new cases, they desired to consult with the Kinges priuie Counsell ; as appeares in diuerse cases in king *Ed. 3.* histime.

39. Ed. 3. li. A.C.
P. 1.

R. W. assaulted *Adam Brabson* in presence of the Iustices of Assise at *Winchester*, for which *A. B.* complained by Bill before the saide Iustices, alledging this offence to bee in despite of the King and his Iustices, to his dammage of an hundred pounds. *R. W.* pleaded, Not guiltie ; and was found guiltie, and dammages taxed to tenne pounds. Thereupon the Judges awarded him to prison in the Sherifes keeping. And for the Fine, and that which should be further done for the King, for the assault done in the presence of the Judges , they would haue the ad-

uise

M. 19. Ed. 3.
Judgement 174

uise of the Kings Counsell : For in a like case, because R. C. did strike a Iurour at *Westminster*, which passed in an Enquest against one of his friends, It was adiudged by all the Counsell, that his right hand should be cut off; and his lands and goodes forfeited to the King. These bee the words in the Booke.

In this case I note three things.

1. The Judges consulted with the Counsell.

2. They had a like Case before when the Counsell was also consulted with, *viz. An. 19. E. 3.* and yet they would not proceede in this case before they had againe consulted with the Counsell.

3. That before *Anno 19. Ed. 3.* there was no like case nor precedent for such a Judgement ; And therefore the Judges would not of themselues pronounce that heauy Judgement before they had conferred with the Counsell touching the same. And after they had the opinion

and aduise of the Kinges Counsell, they proceeded to that Iudgement.

M.39.Ed.3.35

Thomas Vghtred Knight, brought a *Forme-done* against a poore man and his wife ; They came and yeelded to the Demaundant, which seemed suspitious to the Court : whereupon they examined the Matter , and staied Iudgement , because it was suspitious. And *Thorpe* saied, that in the like Case of *Giles Blacket* it was spoken of in Parliament : And wee were commaunded , that when any like Case should come, we should not go to iudgement without good aduise. Wherefore sue to the Counsell, and as they will haue vs to doe, wee will ; and otherwise not, in this Case.

M.40.Ed.3.34.

Greene and *Thorpe* were sent by the Judges to the Kings Counsel (where there were 24. Bishops and Earles) to demand of them, whether by the Statute 14.Ed.3. ca.6. a word may be amended in a Writ,

aswell

as wel as a letter or a sillable: for, the statute speakes but of a letter or a sillable; & it was answered, That it may well be amended; For, there can not bee a Word without a Sillable ; and that it was a nice Question of so sage men.

Thus *Arbitria Iudicum*, and *Responsa prudentum* haue beene receiued, allowed, and reuerenced in all times as Positiue Lawe ; and so it must be still ; For, otherwise much mischiefe and great inconuenience will ensue : for new cases happen euery day : No lawe euer was, or euer can be made that can prouide remedie for all future cases; or cōprehend all circumstan-
ces of humane actions which Judges are to determine : Therefore, when such hap-
pen , and complaint is made ; what shall Judges doe ? Shall they giue no remedie to the partie grieued ? Shall they stay for a Parliament ? *Interim patitur iustus*. They must therefore follow *Dictamen rationis* ; and so giue speedie iustice. And in n^o 2

Judges to be
directed by
reason and
discretion.

ny matters of materiall circumstances they must guide themselues by discretion.

As in iudging vpon Presumptions; To discerne which be *Præsumptiones temerarie*, which *Probabiles*, which *Violentæ*.

So for Time ; what is a conuenient Time , and what not.

So for Waste ; what is Waste punishable, and what not.

So for Tenders of money ; what is a conuenient place for tender of mony, and what not : and what is a lawfull Tender, and what not.

So for Disparagement ; what is a disparagement , and what not : And so of other the like cases, which are infinite.

Object.
That the common Lawe is
vncerten.

If it be said(for so some haue said) That if this be thus, then the common Lawe of *England* is vncerten ; and so the rule of Justice, by which the people are gouerned, is too pliable, and too weake, and vncerten.

By

Responſ.

By the same reason it may be said, That all the Lawes of all nations are vncerten : For, in the Ciuile Lawe, which is taken to be the most vniuersall and generall Lawe in the world, they hould the same rule and order in all cases which be out of the direct words of the Lawe ; and such cases bee infinite : For, as Isaied, new cases spring euery day as malice and fraude increaseth. And since the Roman Empire beganne, most of their Lawes be either *Edicta Principum*, or *Arbitria Iudicium*, or *Reſponſa prudentum*. And in their Iudgements they are guided by Arrests and former Iudgements, as may appeare in the books of many that haue collected such Arrests. And they attribute so much to such former Iudgements, That as *Pryſot* equalleth them to a Positiue Lawe, so they hould, That *Sententia facit Ius, & res iudicata pro veritate accipitur, & legis interpretatio legis vim obtinet.*

Nay (which is more vncerten) Sometimes they reliē vpon Doctours opinions

deliue-

deliuered in their Prelections and Treatises. And when they finde them varying, and differing one from another (as sometimes they doe) then they preferre that which is *Communior opinio*: And so in good reason they may : For, *Pluralitas idem sententium semper superat ; quia facilius inuenitur quod à pluribus quæritur.*

But to conclude this point , I would aske of these Nouelists, what they would haue done in *Sibill Belknappes* case, if they had liued in *Henry the fourths* time ?

M.3.H.4.7.

Sir *Robert Belknappe*, that reuerend and learned Iudge , of whome sundrie noble and worthie persons , and some now of great & eminent place in *England* are descended, was banished out of the Realme, (*Relegatus in Vasconiam*,) not for any desert or offence of his , but by the might of his potent enemies , and malice of the tyme. The Lady his wife continued in *England* ; she was wronged ; she brought a Writ in her owne Name alone, not naming her Husband . Exception wastaken against

it,

it, because her husband was liuing ; and it was adiudged good, and she recouered: and the Judge Markeham said ;

*Ecce modo mirum quod fœmina fert Breue Regis,
Non nominando virum coniunctum robore legis.*

Here was a rare and a new case, yet it was not deferred vntill a Parliament : it was iudged, and her wrong was righted by the common Law of *England*, and that *Ex arbitrio Iudicium & ex responsis prudentium*; and yet it was counted *Mirum* with an *Ecce*.

Now to applie this to R. Caluines case: his case is rare and new; so was that: There is no direct Law for him in precise and expresse tearmes: There was neuer Iudgement before touching any borne in Scotland since King James beganne his happy raigne in *England*: Hee is the first that is brought in question: So there was no direct Law for Sibill Belknap to sue in her owne name without her husband, who

was then liuing : nay rather there was direct Lawe against it ; yet by the Lawe of *England* shee had Iudgement to recouer with an *Ecce modo mirum* : So by the Lawe of *England* Iudgement ought to be giuen for *Robert Caluine*, but not with an *Ecce modo mirum* ; but vpon strong Arguments deduced *à similibus*, and *ex dictamine rationis*.

But before I come to those arguments, I wil vse a few words more touching some Rules which I haue read, for the interpretation of Lawes.

There is a graue and learned Writer in the *Ciuile Lawe* that setteth downe foure wayes and formes of interpretation of Lawes: That is, first, *Interpretatio historica*; secondly, *Etymologica*; thirdly, *Analogica*; fourthly, *Practica*.

In the Argument of this Case all these formes haue been vsed, and largely handled: and the two first be those that seeme but light to me, and therefore in mine o-

Note foure
formes of in-
terpretation
of Lawes.

pinion haue beene too much stod vpon,
and ouer-weighed.

For the Historicall Interpretation, it
is alwaies darke, obscure, and vncerten, of
what kingdome, country, or place soeuer
youspeake; I doe alwayes and onely ex-
cept the diuine Histories written in the
Bible.

*Liuy saith, In tanta rerum vetustate multi
temporis errores implicantur.*

Saint Augustine speaking of the suppo-
sed booke of *Henoch*, saith, *Libri isti ob-
nimiam antiquitatem rei ciuntur.*

Wherefore, for this part let this suf-
fice, whether in the beginning there were
one or seuerall kingdomes in great *Bri-
taine*; or one or seuerall Monarchs and
Kings of these two great & famous King-
domes in great *Britaine*. The King our So-
ueraigne is lawfully and lineally descen-
ded of the first great Monarchs & Kings
of both the Kingdomes; and that by so
long a continued line of lawfull descent, as

Historica.

*Fergm.
Inas.*

therein hee exceedeth all the Kings that the World now knoweth ; and therefore to inquire further of Historicall knowledge in this Case , I houldit needlesie.

Etymologica

For the Etymologicall Interpretation, there hath beene very much said, euен as much as Wit & Art could devise : There haue beene alleaged many Definitions, Descriptions , Distinctions, Differences, Diuisions , Subdiuisions , Allusion of wordes , Extension of wordes, Construction of words ; and nothing left vnsearched to finde what is *Ligeantia*, *Allegiantia*, *Fides*, *Obedientia*, *Subiectio*, *Subditi* ; And who be *Aborigines*, *Indigenæ*, *Alienigenæ*, *Aduenticyj*, *Denizati* &c. And much of this hath beene drawne out of some Writers of the Ciuile Lawe ; amongst whom the Etymologicall Interpretation of the words *Ligeus*, and *Ligeantia*, is as vncerten and doubtfull , as it is with our common Lawyers ; And so vpon any of these there cannot be any certen Rule found for Iud-

ges to iudge by , especially in new and rare Cases.

As for Definition , *Vlpian* teacheth vs , *Omnis definitio in iure Ciuili est periculosa* : and it is said, that *Definitio est duplex* : *Propria, quæ constat ex genere, & differentia* : *Impropria, quæ & descriptio vocatur, & est quælibet rei designatio* : So Definition and Description are often confounded, and both vncerten. Then, since both be vncerten and dangerous , I will leaue both and seeke a more certen Rule to iudge by .

As for Etymologie of words , I agree with him which saieth , It is *Leuis & fal-lax* , & *plerumque ridicula* . It is a Pedant Grammarians fault. *Marcus Varro* and others haue beene noted for it . And if you examine the Examples which some doe bring , you will perceiue how ridiculous and vaine it is : So this Rule will not serue to finde out that which wee seeke for : These bee but *Tendiculæ verborum, & Aucupationes syllabarum* as one calleth them : It may haue some vse, and

serue a turne in Schooles, but it is too light for Judgements in Lawe, and for the seates of Justice.

Aquinas setteth downe a more certen Rule, *In vocibus videndum, non tam à quo quam ad quid sumantur.* And wordes should bee taken *Sensu currenti*: for Use and Custome is the best Expositor both of Lawes and Wordes; *Quem penes arbitrium & ius & norma loquendi.*

Wherefore, of the many and diuerse distinctions, diuisions, and subdiuisions, that haue beene made in this Case, I will say no more but, *Confusum est quicquid in puluerem sectum est*: and will conclude with Bishop Iuel; *A man may wander and misse his way in Mists of Distinctions.*

*Ligeantia sensu
currenti est vincu-
lum fidei &c.*

Then leauing these Historicall and Etymologicall Interpretations, and these curious and subtile Distinctions and Diuisions, I say, *Ligeantia*, or *Allegiantia* vnderstood *Sensu currenti*, is *Vinculum fidei & obediencie*, as Justice Daniel said well. And

hee that is borne in any of the Kings Dominions, and vnder the Kings obedience, is the Kings liege subiect, and borne *Ad fidem Regis* (for that is the proper and ancient word which the Law of *England* hath vsed ; *Ad fidem Regis Angliae*, *Ad fidem Regis Franciae*) and therefore hee can not bee a Stranger or *Alien* to the King, or in any of his Kingdomes ; and by consequence is inhablled to haue lands in *England*, and to sue , and be sued in any Reall action for the same.

And *Ligeantia* hath sometimes a more large Extension : For, hee that is an *Alien* borne out of the Kings Dominions , vnder the obedience of another King, if hee dwell in *Englund*, and be protected by the King and his Lawes , hee oweth to the King the duetie of *Allegeance* ; and so he is *Ligatus Regi*, and *Ligeus Regis* : and if hee commit treason , the Indictment shall be *Contra ligeantia sua debitum*, as it was in Shry-ley the French-mans, case : yet is hee not the Kings subiect : for, hee was not borne

Ad fidem Regis; But, this is not that Ligeance which wee must finde: For, in a true and lawfull subiect, there must be *Subiectio, fides, & obedientia*; and those cannot be seuered, no more than true Faith and Charitie in a true Christian. And he that hath these three *à Natiuitate* is *Ligeus Regis*, and can not be a Stranger or *Alien* to the King, or in his Kingdomes. And that it is so, may be proued by the Rule of the other two Interpretations of Lawe; That is, *Analogica, & Practica*.

Analogica.

King *James* hath now the Kingdomes of *England*, *Scotland*, and *Ireland*, and the Isles of *Gernsey*, and *Jersey* by dissent; all these bee his Dominions, and vnder his subiection and obedience.

King *Henry* the second had *England* and *Normandy* by dissent, from his mother *Mawd the Empresse*; and *Aniow*, and *Maine* by dissent from his father *Geffery Plantagenet*; and *Ireland* by conquest.

Henry the third had *England* and *Ireland*

by

by discent from his Grand-father *Henry* the second : and *Aquitany* by discent from his Grand-mother *Queene Elenor* wife to king *Henry* the second , and daughter to the duke of *Aquitany*.

Edward the first had all the same by discent ; and part of *Scotland* by Conquest.

Edward the second , and *Edward* the third had all the same by discent also : and besides , *Edward* the third claimed all *France* by discent from his mother *Queene Isabell* , and had the most part of it in possession ; and so had *Henry* the fist and *Henry* the sixt also.

Now if in these kings times , Subiects borne in those Countries, being then vnder their obedience , were no *Aliens* , but capable of Lands in *England* : And if at this time subiects borne in *Ireland* , or *Gernsey* , and *Jersey* be no *Aliens* , but capable of Lands in *England* ; then , by an *Analogicall* Interpretation , why should not subiects borne in *Scotland* be at this time in like de-

gree? For, in proportion, and in like-nesse, and conuenience, there can bee no difference at all.

*Præctica: &
sic ad similia.*

But whether the subiects borne in those Countries in the time of those kings were then capable of Lands in *England* as naturall subiects; or were deemed *Aliens*, is the Question: and therein *Interpretatio Præctica* is to be considered; and so the case is brought to be examined *per similia*. And in *Diuinitie Praxis sanctorum est interpretatio præceptorum*.

Now then the Question is, Whether the Kings Subiects of *England* and *Scotland*, that be *Post-nati*, may be resembled to the Kings subiects of *Ireland*, and the Isles of *Gernsey*, &c. and as now they bee: and to the Subiects of *Normandie*, *Aniow*, and *Gascoyne*, and parte of *Scotland* in former times, when the same were the Dominions, and vnder the obedience of the king of *England*: (for I speake alwaies, and would be vnderstood of kingdomes and

domi-

dominions in possession, and vnder obedience, and not of those whereunto the King hath right, but hath no possession or obedience.) I hould, that in all points materiall concerning this Question they are alike, thogh not in all things: (for , then it were *Idem*, and not *Simile* :) and this can not be better vnderstoode, than by examining the Obiections to the contrarie : which in substance may be reduced to foure in number.

First for *Ireland*, it was gotten by Conquest, and the Conquerour may impose what Lawes hee will vpon them : But it is otherwise of kingdomes comming by dissent.

This is a conceipted difference , and lacks the foundation of Reason, and hath not the true parts of a difference: for those that are borne in *Ireland* , and those that are borne in *Scotland* , are all alike for their birth within the Kings Dominions , and

Ireland.
Obiect. I.

Respons.

are borne vnder the like subiection and obedience to the King , and haue the like bond ; Nay, euен the same bond of *Allegiance* ; That is, they are borne *Ad fidem Regis*.

Besides, where it is said, The Conquerour may impose what Lawes hee will : Then consider how it was in the *Interim* before king *John* gaue Lawes to *Ireland*.

Nay, which is more , I aske whether the Conquerour of *Ireland* can giue new Lawes to *England* , and make Irishmen to be as naturall borne subiects in *England* (if their birth-right doe not giue it them) which before the Conquest they were not ? for, that is properly the Question : But if any difference be , the Case of descent is the stronger : For , (as Iustice *Yelverton* said) That is by an vndoubted Title made by lawe ; the other by a doubtfull Title wonne by the Sword.

France.

But leaue *Ireland* gotten by Conquest ; what say you to the great kingdome of

France ; which *Edward* the third had first in right by lawfull descent, and after in possession by triumphant Conquest; and which *Henry* the sixth held after in possession by descent? Was euer doubt made, whether the subiects borne there so long as it was in subiection and obedience to the king were capable of Lands in *Eng³land*?

I will now turne the Case, and aske an other question; If King *James* our Soueraigne had first beene king of *England* by lawfull descent (as now hee is) and after *Scotland* had descended vnto him, should not the Subiects of *Scotland* (I speake still of *Post-nati*) haue beene iudged as Naturall subiects in *England*, as those of *France* were in *Ed. 3.* time?

Then, he having now both kingdomes by lineall, true, and lawfull descent, it can make no difference touching the capacite of subiects, which kingdome descended to him first, and which second; but both are to him alike. And it is cleere,

Post-nati in *England* are now capable and inheritable in *Scotland*, though some haue made a causelesse and needelesse doubt of it : and so on the other side those of *Scotland* are in *England*.

Normandy,
and Aquitany.
Obiect. 2.

It is saide *Normandie* and *Aquitany* were no Monarchies or Kingdomes, but Dukedomes or Seigniories in *Fraunce*, and holden of the Crowne of *France*, and therefore not to be resembled to *Scotland*, which is an ancient and absolute kingdome.

Reffons.

This Obiection reacheth not to the reason of our Question : For , bee they kingdomes, be they Seigniories, yet the subiects borne there , were borne out of the kingdome of *England*, and so in that respect Aliens : But in that they were borne within the kings dominions , and vnder his subiection and obedience , they were no Aliens but liege and naturall borne subiects to the King ; and so capable and inheritable in *England*.

I say besides, the dukes of *Normandie* and *Aquitany* were absolute Princes, and had soueraigne power in those countries, although they did not beare the name of Kings; as at this time the duke of *Sauoy*; the duke of *Florence*; the duke and state of *Venice*; and of late, the great duke of *Rus-
sia*; the duke of *Burgundy*; the Archduke of *Austria*, &c.

So the difference in Stile and Name makes no difference in Soueraignty: For, king *Henry* the eight had as absolute soue-
raignetie in *Ireland*, when his Stile was Lord of *Ireland*, as when hee changed his Stile, and was called *King of Ireland*.

And to say, That the Tenure of the Crowne of *Fraunce* should giue any priu-
ledge to them of *Normandy* and *Aquitany* in *England* is a strange conceipt; It might rather be obiected against them. But, as I saide before, they were borne within the kings dominions, and vnder his obe-
fance, and therefore as subiects borne in *England*.

And

And if men may beleue some ancient Stories, *Aquitany* and *Normandy* had sometimes kings, and were kingdoms of themselves: and not depending nor subiect to the *Crowne of France*: and the kingdome of *France* was then a small portion of *Gal-lia*, and but a little one, in comparison of that which it is at this day. And some say, that there were foure and twentie kings in *Gaule*: But as the kings of *France* increased in power and strength, they subdued their neighbor-Princes, and so that kingdome grew to that greatnesse that now it is at; euен as the *Heptarchie* in *England* was dissolued, and made an intier kingdome, when one of the kings mightier than the rest subdued his Neighbours.

The *Crowne*
and great *Seale*
of *England*.
Obiect. 3.

Reffons.

It is said further, that *Normandy* and *Aquitany*, were subiects to the *Crowne of England*; and to the great *Seale of England*; but so is not *Scotland*: Ergo &c.

This standeth not wel with that which

but

was

was obiectet before ; That they were but Seigniories houlden of the Crowne of *Fraunce*. And it is true , that before *Edward* the thirds time , those kings of *England* that held those great Seigniories , did acknowledge, that they held the same of the Crowne of *Fraunce*.

But these Obiections be light, and not worth the time that hath beene spent about them . The Soueraignty is in the person of the King ; the Crowne is but an Ensigne of Soueraignty ; the Inuesture and Coronation are but Ceremonies of honor , and maiestie : the King is an absolute and perfect king before he be crowned, and without those Ceremonies.

The Seale is to be altered and changed at the will and pleasure of the King : hee may haue one, hee may haue many , as pleaseth him . The King did vse Queene *Elizabeths* Seale , for diuerse moneths after his comming into *England* . Queene *Elizabeth* vsed king *Philips* and queene *Maries* seale for a time ; and queene *Marie* v-

sed king *Edwards* seale : And all that was so done, was well and lawfully done. Many things were done by ancient kings of *England* before the Conquest by their signature, and signe manuell without anie seale at all ; and some such since the Conquest also : as Graunts made by *Maude* the Empresse to *Albericke de Vere*, and others.

The King may by his great seale commaund all his Subiects that bee vnder his obedience wheresoeuer they bee in the world : So he did in *Normandy* ; so he did in *Aquitany* ; so he did in that part of *Scotland* that he had in possession: And in 24. *Edw. I.* his Judges kept ordinarie Courts of iustice there : and I haue seene the Records of *Placita Exercitus Regis apud Edinburgh*, *Apud Roxburgh*, *Apud S. Johns-Towne*, &c. in *Scotia*. So hee may commaund his subiects, if they be in *France*, *Spaine*, *Rome*, or *Turkie*, or the *Indies*. And for seuerall seales, the Earle of *Chester* had a speciall seale for that his ancient County *Palatine*: The Duke of *Lancaster* had a speciall seale

for his new County *Palatine*. And after, when these Countries came to the kinges possession, the Kinges continued seuerall seales in them both for the administration of iustice; but as subordinate to the great seale of *England*.

And I make little doubt, but if the King shall now command any of his subiects of *Scotland* vnder his great seale of *England*, they will (as they ought) dutifullly obey him : As in *Edward* the 1. *Edward* the 2. and *Edward* the 3. times they commaunded many of the Lords of that parte of *Scotland* which then was vnder their obedience.

I finde, that in 13. *Edw.* 2. quarto die Junij, the King Constituit *Adomarum de Valentia* comitem *Pembrochiae* Custodem Regni sui; ac locum suum tenentem quamdiu Rex in partibus transmarinis moram fecerit. And the next day, viz. Die *Louis* quinto die Junij Rex ordinavit, quod magnum Sigillum suum remaneret clausum in aliquo loco seculo, dum Rex esset in partibus

transmarinis : Et ordinavit quoddam aliud paruum Sigillum interim pro regimine Regni, ad brevia, &c. Consignanda, sub Teste Adomari de Valentia Comitis Pembroch. Nota, heere was a petty seale pro regimine Regni, wherein are comprised Commissions for Justice, Mandatoria, & ad brevia consignanda ; which is for Remedialia as they are tearmed.

Seueral Laws.
Obiect. 4.

It is saide, that Scotland hath Lawes that are proper for that kingdome, and that they are not subiect to the Lawes of England, and so è contra.

And lastly it was saide, that in England euery person was within the iurisdiction of some Leete, and at the age of twelue yeeres euery one is to bee sworne in the Leete to be Foiall and Loiall to the King of England ; That is, to the Lawes of England, (for so hee vnderstoode Loiall:) But Post-nati in Scotland can not be so; and that they haue another forme of Oath in Scotland : Ergo, &c.

Respons.

For this last part, of the oathe in the Leete, the Lord chiese Baron did cleare it so plainly, as more needes not to be faide. This is *Legalis ligeantia*, It is not *Alta ligeantia* by birth, which is that which we haue now in Question.

The Historicall discourse that hath bin made of Leetes, of Law-dayes, of *Decenna*, *Decennarij*, of the Tenne-mens Tale, and the Oathe of all Male children of twelue yeeres, &c. taken at the Lecte, is no newes indeede, it is very olde.

Master *Lambard* hath it all, and more too, at large in *Explicatione verborum* in the word *Centuria*; It was before the Conquest.

But it maketh nothing to this naturall Allegiance and subiection of birth; it is not *Alta ligeantia* by birth-right; it is but *Legalis ligeantia* by Policie. And *Fitzherbert* calleth it *Swearing to the Lawe*.

And if that were the onely Bond and Marke of Allegiance, many are out of it, and so at libertie: As, children vnder

*Lambard in ex-
plicatione verbi
Centuria.*

twelue yeeres ; yet sometimes they may commit treason and felony; where, *Mali-
tia supplet aetatem*: So women of all sortes; yet they may be shrewd and dangerous traitours ; and if they bee women nobly borne, or widowes that were wiues to noble men , they shall be tried *per pares* :

Also Noble men of all sortes, who are neither bound to attend the Leete, nor to take that Oathe , as appeareth by *Britton cap. 29.* treating of the Court called *The Shirifes Turne*, out of which the Leete seemeth to be extracted : For, whatsoeuer is not presented in the Leete may be presented and punished in the *Shirifs Turne*. And M. *Kitchin* citeth *Britton* in this point for the Leete; and alleadgeth also the statute of *Marlebridge cap. 10.* to the same purpose.

And at this day the view of Francke-pleges and the putting in of Francke-pleges, and the *Decennary*, are but bare names of things past, the vse and substance is obsolete and gone.

And

And, as it was saide, few in this place haue put in such Pleges, or taken that Oath, and yet I trust wee are good subiects, and beare true faith and allegiance.

But this hath beene so fully answered and cleared by the Lord chiefe *Baron*, and the Lord *Coke*, chiefe Iustice of the Common pleas, as I doe wrong to spend time in it.

But touching the seuerall Lawes; I say, that seuerall lawes can make no difference in Matter of Soueraignetie; and in the bond of *Allegeance* and obedience to one King: And so it concludeth nothing for the point in question.

Normandy and *Aquitany* had seuerall lawes differing from the lawes of *England*: so had *France* in king *Edward the 3.* and *Henry the 6.* time.

Ireland, before king *Johns* time continu-ed their ancient lawes, and so, for the most part, haue done euer since.

Gernefey and *Jersey* haue yet at this day

seuerall lawes , which, for the most part, were the ancient lawes and customes of Normandy.

Wales had , and in many things yet haue seuerall lawes : so for the Countie Palatine of Chester also.

Yet these neuer were , nor must not be cantelled and cut off from their allegiance and obedience to the King ; nor the Kings subiects borne there be incapable of Lands and Inheritance in *England* : for where there is but one Soueraigne, all his subiects borne in all his Dominions be borne *Ad fidem Regis*; and are bound to him by one bond of Faith & Allegiance: And in that, one is not greater nor lesser than an other ; nor one to bee preferred before an other : but all to be obedient alike ; and to be ruled alike ; yet vnder seuerall lawes and customes. And as Saint Gregorie saith of the Church , *In una fide nihil officit Ecclesiæ sanctæ diuersa consuetudo*. So I will conclude for this point, That diuersitie of Lawes and Customs makes no

breach

breach of that vnitie of obedience, faith, and allegiance, which all liege subiects owe to their liege King and Soueraigne Lord. And as none of them can be aliens to the King, so none of them can bee aliens or Strangers in any of his kingdomes or dominions ; nor Aliens or Strangers one to another, no more than a Kentish-man, to a Cheshire-man ; or *& contra.*

And therefore all that haue bin borne in any of the kinges Dominions since he was kinge of *England* are capable and inheritable in all his Dominions without exception.

And as to the other part of the Obiection, that there will be defect of triall ; for, things done in *Scotland*, cannot bee tried in *England* ; I say, that that maketh little to our present Question, whether *Post-nati* in *Scotland* bee Aliens in *England*, and not capable of landes in *England* : but it trencheth to cast some asperion vp-on the common lawe of *England* ; That

Defect of Tri-
all.

it is not sufficient to giue iustice to the kinges subiects for lacke of sufficient meanes of triall of queititions of fact: but to this baron *Altham* gaue so full an an-sweare, as more cannot bee saied: And so he did both cleare the doubt, and did vphould the sufficiency of the lawe of *England* in that behalfe. And it seemeth strange, that this should now bee found out to bee obiected against *Scotland*, since it was neuer heeretofore obiected for *France*, *Normandie*, *Aquitany*, nor is at this day for *Ireland*, *Gernesey*, and *Jersey* &c. whereas all stand vpon the same reason for the point of Triall. But the wisedome of the lawe of *England* hath beene such, as there neuer failed certen rules for triall of all questions in fact; and those were fitte and adapted to the Matter which was to bee tryed. And therefore, whosoeuer doth diligently obserue it, he shall finde in the course and practise of the lawes of *England* aboue twenty seuerall formes of Trialls: as by Battell; by Iurie, and that

in diuerse kindes; by Wager of Lawe; by Proofoes; by Examination; by Inspection; by Certificates of diuerse kindes; and by manie other waies: And lest there should bee any defect in that behalfe the lawe hath prouided seuerall formes of *joyning of issues*; and in that, hath speciall regard of things done out of the Realme, as euery Student may see in the booke of Reports.

Thus I haue passed these foure Obiections, and therefore for this part I conclude, That if *Argumentum à simili* were euer good and concludent in Lawe, my Lords the Judges haue procued this Case by so many plaine and direct Examples, and like Cases; and by so many stronge arguments & solide reasons drawne out of booke Cases, out of Statutes, out of the true rules and forme of pleading, and out of ancient Records and Precedents, some produced by M. Attorney, and many more remembred by the Judges, as no

one thing can be more plainly exemplified, nor appeare more like to an other, than this Case is to those Cases which they haue remembred.

*Recurrend. ad
Rationem.*

But if examples and arguments à simili doe faile, then it remaineth *Recurrere ad Rationem*; and what reason that ought to bee, and how to bee vnderstoode, is to be considered: for, it is said, that *Lex est ratio summa iubens ea quæ facienda sunt, & prohibens contraria*. So it must be the depth of reason, not the light and shallow dis-tempered reasons of common discour-sers walking in Powles, or at Ordinaries in their feasting and drinking, drowned with drincke, or blowne away with a whisse of Tobacco. *Lacretius* noteth, that in many there is *Rationis egestas*: And saint *Gregory* saith, *Qui in factis Dei rationem non videt, infirmitatem suam considerans cur non videat, rationem videt*: For, although Reason and Knowledge bee infinite, yet no man can haue more of it than he is capable of: Euery man must receiue it, and keepe it

in his owne vessell ; he cannot borrow his Neighbours braine-pan to put it in. And therefore it is not without cause, that one of the grauest and best learned lawyers of our age, and a priuie Counsellor to one of the greatest Monarchs of *Europe*, describeth those that should bee Interpreters of lawes by foure speciall qualities, That is, 1. *Ætate graues*, 2. *Eruditione præstantes*, 3. *Vsu rerum prudentes*, 4. *Publica auctoritate constituti* : So, there must be grauitie, there must be learning, there must be Experience, and there must be authortie : and if any one of these want, they are not to bee allowed to bee Interpreters of the lawe.

How all these qualities concurre in these reuerend Judges, whome wee haue heard in this present Case, I will spare to speake what I thinke : For, *Chrysostome* teacheth mee, *Qui laudatur in facie, flagellatur in corde.*

In seeking out this depth of Reason,

*Hopperus de no-
ra Iuris pru-
dentia pag. 118*

Hopperus ibid.
pag. 119.

the same Author giueth a caution, which is this ; *Vitium quod in hoc genere fugi debet est, ne, si Rationem non inuenias, mox legem sine ratione esse clamis.* And in 36.H.6. Fortescue saith the same in effect, which is thus ; *WEE haue many Courses and Formes which bee houlden for Lawe, and haue beene houlden and vsed because of Reason ; and notwithstanding the reason bee not ready in memory, yet by studie and labour a man may finde it.*

Now when wee come to examine by reason, whether *Post-nati* in Scotland shall be disabled as aliens, or shall bee capable of lands in *England*, as naturall borne subjects there ; wee are first to consider what is the reason why aliens in the Dominions, and vnder the obedience of other forraine Princes, are not capable of lands in *England* : And surely the true reason is, that which was noted by baron *Altham* ; and hath since bin ofte remembred, viz. The danger that might thereby come to the King & the common-weale : Special-

ly by drawing hither too great multitudes of them: for so the Treasure of the realme might be transported by them into other forraigne Kingdomes and Countries; whereby it might bee vsed against the King, and to the priuadice of the State. And besides, they might vnder-hand practise Sedition and Rebellion in the kingdome, and cause many other dangers and inconueniences: but that reason cannot serue against Post-nati in *Scot-land*, now that there is but one king of both the kingdomes, no more than it can serue against those that are borne in *Ireland*, or *Gernesey*, or *Jersey*: and therefore in reason they are as capable of landes in *England* as the kings subiects of *Ireland*, and *Gernesey*, and *Jersey* are.

Against this, there haue also been many Obiections made, and Reasons deuised that seeme witty, and haue some shew of probabilitie to proue that Post-nati in *Scot-land* are Aliens, and ought not in reason

Obiections.

to bee capable of landes in *England*, *vide* *licet* :

1. That *England* and *Scotland* were two ancient seuerall kingdomes vnder seuerall Kinges, and seuerall Crownes.

2. That they continue yet seuerall kingdomes.

3. That they haue yet seuerall Lawes, seuerall Seales, seuerall Crownes, and seuerall Kinges : For, it is said, though King *James* be king of both, and hath but one naturall bodie, yet in iudgement of lawe, hee is in respect of his two seuerall kingdomes, as two seuerall kinges, and the subiects of eche seueral kingdome are bound to him by distinct allegiance, according to the seuerall lawes of the kingdome where they were borne.

And all this is grounded vpon this rule or fiction in Lawe : *Quando duo iura concur- rint in una persona, aequum est ac si essent in diversis.*

And vpon this ground, is this new form of pleading devised, which the De-

fendants haue vsed in this Case : such as cannot be found in any Record , euer to haue beene pleaded before ; and may as well serue against the Kinges subiects of *Ireland* , as against the *Post-nati* of *Scotland* . And sithence in former times the like forme of pleading was neuer seene against any of the kings of *Englandes* subiects, which were borne in any of his dominions out of *England* , as in *Normandie* or *Aquitany* , or in *France* (I meane such part of it as was in the kinges possession , and in subiection and obedience to him , and not in that parte of *France* which his Enemies helde) it may be probably inferred, That it was then generally houlden, that neither such a forme of pleading, nor the Matter it selfe was sufficient in Lawe to disable any such plaintife : for , against French-men that were not vnder the kinges obedience wee finde it often pleaded. And as those that were not subiects to the Kinge, nor borne vnder his obedience , did then presume to bring suites,

and actions in *England*. So it can not bee thought, but that the King hauing then so large and ample Dominions beyond the Seas, as *Normandy* and *Aquitany*, and many other parts of *France*, some of his subiects borne there, had cause to haue, and did bring the like suites in *England*. And sithence no such Plea is found to haue beeene then vsed against them, it can not in Lawe and Reason bee now alowed against the *Post-nati* in *Scotland*: For, I may say as *Ascue* said in 37. *H. 6.* Our Predeces-
sors were as sage and learned as we be.

And I see not, but that in this Case a good argument may bee reasonably deduced from the Negative, as it was in the Case reported by the great learned, and most graue and reuerend Judge sir *James Dyer* chiefe Justice of the Commonpleas, *Anno 23. Elizab.* The question there, was Whether an erronious Judgement giuen in *Ric*, which is a member of the Cinque-
portes, might bee reuersed in the kinges Bench, or Common place at Westmin-

P. 23. Elizab.
Dyer. 376.

ster;

ster; And it was thus resolued; Sed pro eo quod nullum tale breue in Registro nec in aliquibus Præcedentibus Curiarum prædictarum inueniri potuerat, dominus Cancellarius Bromley per opinionem Capitalium Iusticiariorum utriusque Banci denegauit tale breue concedere. And so Iustice Fenners argument houldeth well, viz. There is in this Case no lawe to exclude the Complainant, Ergo he is a liege and a naturall borne subiect.

But the forme of pleading in the time of king Ed. i. in Cobledickes case, which was cited out of *Hengam*, (and the booke shewed here by the Lorde chiefe Iustice Coke) is so direct and plaine for this our Question, as nothing can be more plaine: and therefore I thinke it not amisse to report it againe.

That Case was in effect and substance, thus:

A woman brought a Writ of *Ayell* against *Roger Cobledicke*, and declared of the seisin of *Roger* her Grand-father, and conueied the dissent to *Gilbert* her father;

and from him to the Demaundant, as his daughter and heire. The Tenant pleaded, that the Demaundant was a French-woman, and not of the liegeance nor of the fidelitie of *England*; and demaunded Iudgement if shee ought to haue the action against him. This plea was houlden to bee insufficient ; and thereupon the Tenant amended his plea, and pleaded further , That the Demaundant was not of the liegeance of *England* , nor of the fidelitie of the king ; and demaunded Iudgement,&c. And against that plea none exception was taken, but thereupon the demaundant prayed licence to depart from her Writ . By this it appeareth plainly, that the first plea , alledging that she was a French-woman , and not of the liegeance , nor of the fidelitie of *England* , was insufficient (and so declared by *Berreford* the chiefe Justice) For, there can bee no fidelitie nor allegiance due to *England*, respecting the land and soile without a Souveraigne and King . But the second Plea

alledging,

alledging, That shee was not of the lige-
ance of *England*, nor of the fidelitie of the
King, was good and sufficient : for, to
the King fidelitie and allegiance is due ;
and therefore, since shee failed in that, she
was not to be answered : and thereupon
shee praied licence to departe from her
Writ, and so shee left her Suite.

Now for the reasons which haue been
drawne and strained out of the Statute
Anno 14.Ed.3. if they bee well examined,
they serue little for this point which wee
haue in hand.

It is to be considered, at what time, and
vpon what occasion that Statute was
made: King *Edw.3.* beeing right heire to
the Crowne and Kingdome of *France* by
descent from his mother, and hauing
spent many yeares for the recouering of
the same, resolued to take vpon him the
Name and Stile of *King of France* ; beeing
aduised thereunto by them of *Flanders* :
Hereupon he did take the Stile of *King of*

Stat. 14. Ed. 3.
That the
realm of Eng-
land shal not
be subiect to
France.

Fraunce ; and altered his Seale and his Armes ; and after a while , placed the Armes of *France* before the ancient Armes of *England* , as they are borne at this day. This gaue occasion for the making of this statute : for some people (*A scun gentes* , saith the statute) seeing this change, and considering the large and ample Extent, and the magnificence of that great Kingdome, began to doubt that the King would make his Imperiall seate there; and conceiued thereby, that the kingdome of *England* , beeing the lesser , should bee in subiection of the king and kingdome of *France* , beeing the greater, and to be gouerned and ruled by a *Vice-Roy*, or *Deputy*, as they sawe *Ireland* was . And though in the kinges stile *England* was placed before *France* , yet they sawe the Armes of *France* marshalled before the Armes of *England* ; though at the first bearing thereof some say it was not so.

To cleare this doubt, and to take away this feare from the subiects of *England*,

was

was this Statute made, as doth plainly appeare by the wordes of the Statute it selfe.

Now if you will make an apt and proper application of that Case then, betweene *England* and *Fraunce*, to this our Case now, betweene *Scotland* and *England*, it must be thus:

1. *Ed. 3.* then king of *England* (beeing the lesser) had afterwards the kingdome of *France* (being the greater) by descent, and tooke the Stile of *King of France*.

King *James* king of *Scotland* (beeing the lesser) hath afterward the kingdome of *England* (beeing the greater). by descent, and taketh the Stile of *King of England*.

2. King *E. 3.* altered his Seale, and his Armes, and placed the Armes of *France* before the Armes of *England*.

King *James* hath changed his Seale and his Armes in *England*, and hath placed the

Armes of *England* before the Armes of *Scotland*.

3. It was then doubted, that King *Edw. 3.* would remooue his Court out of *England* the lesser, and keepe his Imperiall seate and state in *France* the greater.

King *James* hath indeede remooued his Court out of *Scotland* the lesser; and doth in his Roiall person (with the Queene and Prince, and all his Children) keepe his Imperiall seate in *England* the greater.

4. In all these the Cases agree; but yet one difference there is, and that is in the Stile: For king *Edw. 3.* in his Stile placed *England* the lesser, being his ancient kingdome, before *France* the greater, beeing newly descended vnto him.

But King *James* in his Stile placeth *England* the greater, though newly descended vnto him, before *Scotland* the lesser beeing his ancient kingdome.

5. Now this being thus ; perhappes *Scotland* might out of this Example haue conceiued the like doubt against *England*, as *England* did then against *France* : But as there was then no doubt made , whether the kings subiects borne in *England* should be capable of lands in *France*; so, out of this statute, and vpon this example no doubt can bee inferred , whether the kings subiects now borne in *Scotland* shall be capable of lands in *England*.

But , all these Obiections , and the ground whereupon they are framed, *viz.* *Quando duo iura, &c.* haue beene so thoroughly and profoundly examined, and so learnedly and fully answered and cleared by the Judges , as I make no doubt but all wise and indifferent hearers be wel satisfied therein.

And if there be any so possessed with a preiudicate opinion against Truth, and Reason, that will say in their owne hearts *licet persuaseris non persuadebis* ; and so, either Serpent-like stop their eares , or else wil-

fully absent themselues, because they would not heare the weakenesse and absurdities of their owne conceipts laied open and confuted : If there bee any such I say (as I trust there bee but few, and yet I feare there bee some) I would they had learned of *Tertullian*, That, *Veritas docendo suadet, non suadendo docet* . And I wish that they be not found among the number of those to whome Saint *Paul* saith, *Si quis ignorat, ignoret* : And Saint *John* in the *Apocalips*, *Qui fordidus est, fordescat adhuc* . And I will exhort with Saint *Paul*, *Qui tenet tenet, and not wauer or doubt by such weake arguments and obiections.*

A dangerous
distinction be-
tweene the
King and the
Crown.

But in this new learning, there is one part of it so strange, and of so dangerous consequent, as I may not let it passe, *viz.* that the king is as a king diuided in himselfe ; and so as two kinges of two seueral kingdomes ; and that there be seuerall allegances, and seueral subiections due vnto him respectiuely in regarde of his seue-

rall kingdomes, the one not participating with the other.

This is a dangerous distinction betweene the King and the Crowne, and betweene the King and the kingdome: It reacheth too farre ; I wish euery good subiect to beware of it. It was neuer taught, but either by traitors , as in *Spencers Bill* in *Ed. 2. time* (which baron *Snigge*, and the Lord chiefe Baron , and Lord *Coke* remembred) or by treasonable Papists, as *Harding* in his *Confutation of the Apologie* , maintaineth that kinges haue their authority by the positiuе Lawe of Nations, and haue no more power, than the People hath , of whome they take their temporal iurisdiction; and so *Fidlerus Simanca*, and others of that crew.

Or by seditious Sectaries and Puritans, as *Buchannon De Iure Regni apud Scotos*, *Perry*, *Knox*, and such like.

For, by these, and those that are their followers, and of their Faction, there is in

their pamphlets too much fuch traitorous
seede sowne.

Absurdities in
this dange-
rous distincⁿtiō

But leauing this, I will adde a little
more, to prooue, that in reason *Robert Cal-*
uine, and other like *Post-nati* in *Scotland*,
ought by Lawe to be capable of landes in
England: and for that, I wil remember one
rule more which is certen and faileth not,
and ought to be obserued in all Interpretation
of Lawes; and that is, *Ne quid absur-*
dum, ne quid illusorium admittatur.

But, vpon this subtile and dangerous
Distinction of Faith and Allegiance due
to the King, and of Faith and Allegiance
due to the Crowne, and to the Kingdome
(which is the onely *Basis* and fundamen-
tall maine reason to disable the Plaintiff,
and all *Post-nati*) there follow too many
grosse, and fowle absurdities, whereof I
will touch some few, and so conclude,
that in Lawe and reason this subtile, but
absurd and dangerous, distinction ought
not to be allowed.

This.

This bond of Allegiance whereof we dispute, is *Vinculum fidei*; it bindeth the soule and conscience of euery subiect, seuerally and respectiuely, to bee faithfull and obedient to the King: And as a Soule or Conscience cannot bee framed by Policie; so Faith and Allegiance can not bee framed by Policie, nor put into a politike body. An oathe must be sworne by a naturall bodie; homage and fealtie must bee done by a naturall bodie, a politike body cannot doe it.

Now then, since there is but one king, and soueraigne to whome this faith and allegiance is due by al his subiects of *England* and *Scotland*, can any humane policie diuide this one King, and make him two kinges? Can *Cor Regis Angliae* be in *manu Domini*, and *Cor Regis Scotiae* not so? Can there bee warres betweene the king of *England* and the king of *Scotland*? or betweene the kingdome of *England* and the kingdome of *Scotland*, so long as there is but one kinge? Can the kinge of *England* now send

an Army roiall into *Scotland* against the king of *Scotland*? Can there bee any Letters of Marke or Reprisall now graunted by the King of *England*, against the subiects of the king of *Scotlind*? Can there bee any Protections now, *Quia profecturus in exercitu Iacobi Regis Angliæ in Scotiam*?

Nay shortly, Can any man bee a true subiect to king *James* as king of *England*, and a traitor or rebel to king *James* as king of *Scotland*? Shall a foote breadth, or an inch breadth of ground make a difference of birth-right of subiects borne vnder one kinge? Nay, where there are not any certain bounds or limits knowne at all, but an imaginary partition wall, by a conceipted fiction in Lawe? It is enough to propound these and such like Questions, whereof many more might bee remembred: they carry a sufficient and plaine answere in themselues: *Magis docet qui prudenter interrogat.*

As the King nor his heart cannot bee

diui-

diuided, for hee is one intier king ouer all his subiects, in which soeuer of his kingdomes or Dominions they were borne, so hee must not bee serued nor obeyed by halues; hee must haue intier and perfect obedience of his subiects: for, *Ligentia* (as baron *Heron* saied well) must haue foure qualities; It must bee 1. *Pura & simplex*: 2. *Integra & solida*: 3. *Vniuersalis non localis*: 4. *Permanens, continua, & illesa*. Diuide a mans heart, and you lose both parts of it, and make no heart at all; so hee that is not an intier subiect, but halfe faced, is no subiect at all; and hee that is borne an intier and perfect subiect, ought by Reason and Law to haue all the freedomes, priuiledges, and benefites pertaining to his birth-right in all the Kinges Dominions; and such are all the *Post-nati* in *England* and *Scotland*. And the inconuenience of this imaginary locall allegiance hath beene so lately, and so fully declared by the Lorde chiefe Iustice *Coke*, as more needes not bee saied in it.

In some speciall cases there sometime may be a king of subiects without land in possession , as Iustice *Fenner* noted in the gouernement which *Moses* had ouer the people of *Israel* in the wilderness ; and as in the case which sir *John Popham* the late Lord chiefe Iustice did put in the Parliament: If a King and his subiects bee driven out of his kingdome by his enemies, yet notwithstanding hee continueth still king ouer those subiects, and they are still bound vnto him by their bond of allegiance, wheresoever hee and they bee : But there can not bee a king of land without subiects : For, that were but *Imperium in belluas* , and *Rex & subditi sunt relatiua*.

Rex solus iudicat, &c.

I saied there was an other generall rule for expounding of Lawes , which I reserved to bee last spoken of , I will now but touch it ; for, I will not stand to examine by humane reasons , whether kings were before Lawes , or Lawes before kinges ; nor how kings were first ordained ; nor

whe-

whether the kings, or the people did first make Lawes ; nor the seuerall constitutions and frames of states and commonweales ; nor what *Plato* or *Aristotle* haue written of this argmment.

They were men of singuler learning and wisedome, but wee must consider the time, and the countrie in which they liued, and in all their great learning they lacked the true learning of the knowledge of God. They were borne and liued in *Greece*, and in popular States : they were enemies, or at least mislikers of all Monarchies ; yet one of them disdained not to bee a seruant or mercenarie hireling to a Monarch. They accompted all the world barbarous, but their owne Countrey of *Greece* : their opinions therefore are no Cannons to giue Lawes to kinges and kingdomes, no more than sir *Thomas Moores Utopia*, or such Pamphlets as wee haue at cuerie Marte.

I beleue him that saith, *Per me Reges regnant, & Principes iusta decernunt*; And

Principa.

I make no doubt , but that as God ordaine
ned kings, and hath giuen Lawes to kings
themselues , so hee hath authorized and
giuen power to kings to giue Lawes to
their subiects ; and so kings did first make
lawes , and then ruled by their lawes , and
altered and changed their Lawes from
time to time , as they sawe occasion , for
the good of themselues , and their sub-
iects.

And this power they haue from God
almighty ; For, as Saint *Augustine* saith, *In
hoc Reges Deo seruiunt sicut eis Diuinitus præ-
cipitur, in quantum sunt Reges, si in suo Regno
bona iubeant, mala prohibeant, non solum quæ
pertinent ad humanam societatem, verum etiam
quæ ad diuinam religionem.*

And I hould *Thomas Aquinas* his opini-
on to be good, *Rex solitus à Legibus quoad
vim coactiuam, subditus est legibus quoad vim di-
rectiuam propria voluntate.* And for this o-
pinion there is a stronger authoritie, euen
from God himselfe in *Ecclesiastes*, ca. 8. ver.
2. *Ego os Regis obseruo; Et præcepta iuramenti*

Dei: & ver. 4. Sermo illius potestate plenus est:
Nec dicere ei quisquam potest, quare ita facis?

Now beeing led a little from the common Lawe to the Ciuile Lawe, I finde in the ciuile Lawe a direct Text, warranting that generall Rule which I reserved to this place, which is this; *Inter aequitatem iusque interpositam interpretationem nobis solis & licet & oportet inspicere*:

And another like Text in these words, *Sententia Principis Ius dubium declarans, Ius facit quod ad omnes*. And some graue and notable Writers in the ciuile Lawe say, *Rex est lex animata*. Some say, *Rex est lex loquens*. Some others say, *Interpretantur legem consuetudo & Princeps*. Another saith, *Rex solus iudicat de causa à iure non definita*.

And as I may not forget Saint Augustines words, which are these; *Generale patrum est societatis humanae regibus suis obtemperare: Sol may not wrong the Judges of the common Lawe of England so much as to*

*Cod. li. I. Tit. 14
le. 1.*

Ibidem le. 12.

suffer an imputation to bee cast vpon them, That they , or the Common lawe doe not attribute as great power and authoritie to their Soueraignes the kinges of *England*, as the Romane lawes did to their Emperours: For, *Bracton* the chiefe Iustice in the time of king *Henry the third*, hath these direct wordes, *De Chartis Regijs & factis regum non debent nec possunt Iusticiarij nec priuatae personae disputare. Nec etiam, si in illa dubitatio oriatur, possunt eam interpretari. Et in dubijs & obscuris, vel si aliqua dictio duos contineat intellectus, domini Regis erit expectanda interpretatio & voluntas; Cum eius sit interpretari cuius est condere.* And *Britton* in the time of king *Ed. I.* writeth as much in effect.

So as now if this question seem difficult, that neither direct law , nor Examples & Precedents, nor application of like cases, nor discourse of reason, nor the graue opinion of the learned and reuerend Judges, can resolve it, here is a true and certain Rule, how both by the Civile Lawe,

and the ancient Common lawe of *England* it may and ought to be decided: That is, by sentence of the most religious, learned, and iudicious king that euer this kingdome or Iland had.

But this Case is so cleare as this needeth not all.

And in this I would not be mis-vnderstoode, as though I speake of making of new Lawes, or of altering the Lawes now standing; I meane not so, but I speake only of interpretation of the Lawe in new questions and doubts, as now in this present case: neither doe I meane hereby to derogate any thing from the high court of Parliament; (farre be it from my thought) It is the great Councell of the kingdome, wherein euery subiect hath interest. And to speake of the constitution or forme of it, or how, or when it was first begunne, is for busie Questionists; It ought to bee obeyed and reuerenced, but not disputed; and it is at this time impertinent to this Question.

But certen it is, it hath beene the wisedome of the kinges of this Realme to reserue in themselues that supreame power to call their Nobles, Clergie, & commons together, when they lawe great and vrgent Causes; and by that great Councell to make Edicts and Statutes for the weale of their people, and safetie of the Kingdome and State, as in *Anno 10. Edw. 3.* the Assembly at *Nottingham* for the great wars in *France*: And in *Anno 20. H. 3.* *Prouisio-nes Merton*, which I remembred before.

Obiect. of
Inconuenien-
cie and fruga-
litie.

There haue beene made some Obiections of inconueniencie, as for bearing of Scot and Lot, and such other charges; and some out of frugalitie, that the king shall lose his profit of making Denizens, and such like: These are so light as I leaue them to the winde; They are neither fit for Parliament, nor Councell, nor Court.

An other argument, and reason against the *Post-nati* hath beene lately made out

of

of diffidence and mistrust, that they will come into *England* sans number, and so as it were to surcharge our Common; and that this may be in *secula seculorum*. I know not well what this meanes. The Nation is ancient, noble and famous; they haue many honourable and woorthie Noble men and Gentlemen, and many wise and worthie men of all degrees and qualities; they haue lands and faire possessions in *Scotland*: Is it therefore to bee supposed, or can it in reason bee imagined, that such multitude sans number will leaue their natvie soile, and all transport themselues hither? Hath the Irish done so? Or those of *Wales*, or of the Isles of *Man*, *Gernesey*, and *Jersey*? Why should we then suspect it now more for *Scotland*?

Nay, doe you suppose that the Kinge of *England* will euer suffer so great a parte of his Dominions, and so great and famous a Kingdome as *Scotland* is to be dis-peopled? It is a doubt imagined without any foundation or ground of reason.

But if it were to bee doubted, the twelue Judges that haue concurred in opinion, and that late worthy Judge *Popham* had as great cause to feare it as any others: They are wise, they are learned, they haue faire possessions and good estates, They haue posteritie to care for, as others haue.

Yet, admit it bee a matter worth the doubting of, what is that to the yoong *Post-nati* that are not like in many yeares to come hither in such number? Shall we vpon this causesse feare depriue them of their lawfull Birth-right?

Haue wee scene in these fiue yeeres past anie moe of them than this one alone that haue gotten any Lands in *England*? And this little that he hath is so small and poore a portion, that his purchase is not great, and therefore no iust cause of offence to any.

Nay, if you looke vpon the *Ante-nati*, you shall find no such confluence hither, but some few (and very few in respect

of that great and populous kingdome) that haue done long and worthie seruice to his Maiestie, haue, and still doe attend him, which I trust no man mislikes: For, there can bee none so simple, or childish (if they haue but common sense) as to thinke that his Maiesy should haue come hither alone amongst vs, and haue left behinde him in *Scotland*, and as it were caste off, all his ould and worthie Seruants.

And if these Noble and worthie Gentlemen of *Scotland*, I meane the *Ante-nati* be louingly and brotherly entertained amongst vs, with mutuall loue & beneuolence, that so we may *coalescere*, & be vnited together, by marriage, and otherwise (as in some particular cases wee see it already happily begunne) no doubt God will blesse this Vnion of both these Nations, and make them, and the King, and great *Britaine* to be famous through the world; and feared & redoubted of our enimies, and of all that wish vs ill: For, *Vis* *temp*

fortior, & concordia multos facit vnum. But what may follow vpon such arguments of diffidence and suspition, which seeme but to hinder Vnion, and to breede discord and dissention I will not speake; Let euery wise man consider it well: For, *Hu-
mana consilia castigantur vbi cœlestibus se præfe-
runt.* And remember Saint Paules caution,
*Si inuicem mordetis, videte ne ab inuicem consu-
mamini.*

And for the resemblance that hath bin made of this Case of Post-nati (but indeed for the Vnion of both Kingdomes) with the houswifes cutting of her cloth by a threedee, I will say but this, That if shee cut her peece of cloth in length aswell as in breadth, all the threeds will bee cutte, and the cloth marred. And this cutting in this our Case, is, to cutte all aswell in length as in breadth, euен through the Kinges Dominions; and so will asunder the whole frame of the V-

nion ; and cut in peeces all the threeds of Allegiance.

But now I wil aske this question: How long shall this suspition and doubt continue? Shall there bee a dis-vnion for euer? If it bee saied, No, but vntill the Lawes, and Customes of both Kingdomes bee made one and the same: then I aske, how, and when shall that be done? And it may bee, that the Constitutions of the Countries bee such as there can hardly in all things bee such an absolute and perfect reconciling or vnitting of Lawes as is fathcied. Is it yet so betweene *England* and *Wales*? or betweene *Kent* and *Cornewall*? or betweene many other parts of this Kingdome? I say no ; and I speake it confidently, and truely it is not so , nor well can be so. Therefore let *England* and *Scot-land* be in like degree now , as *England* and *Wales* were for many hundred yccres and in many things are yet still ; and let Vnion and Loue increase among

A Question,
how long this
suspition and
dis-vnion shall
continue?

Post-nati.

Bernard.

euē in secula seculorum. Let vs not be such as Saint Bernard noteth, *Amant quod non decet, timent quod non oportet, dolent vanē, gaudent vaniūs*. And let vs no longer make question, whether seuerall Lawes and Customes bee markes of seperation and dis-vnion, or of seuerall Allegances; for certainlye they are not.

Obiection vp-
on Diuination

One other Reason remaines against these *Post-nati*, and that is out of a prouident foresight, or as it were a prophesying: What if a seperation of these Kingdomes fall hereafter?

Respons.

Of this I can say but *Absit omen*. It is *Potentia remota* (as Iustice *W*illiams saied) and I trust in God *Remotissima*: And I will euer pray to God that it neuer fall so, vntill the King of all Kinges resume all Scepters and Kingdomes into his owne hands.

Let vs take heede of sinnes of Ingrācie and Disobedience; and remember, *Adam and Eue were punished*, *Non*

propter

Post-nati.

propter pomum, sed propter vetitum. And for such Prophets, let the Prophet *Ezechiel* ca. 13. answer them, *V& Proph&etis insipientibus qui sequuntur spiritum suum, & nihil vident.* And the Prophet *Esay* speaketh to all such with an other *V&e, V& illis qui dispergunt.*

Now then, as M. Solicitor beganne with seeking out the truth; so I will conclude with *Esdras* words, *Magna est Veritas & pr&eualeat: And with this further, Eatenus rationandum donec veritas inueniatur: Cum inuenta est veritas, figendum ibi Iudicium: Et in victoria veritatis, soli veritatis inimici pereunt.*

The Conclusion.

THus I haue heere deliuered my concurrence in opinion with my Lordes the Judges, and the reasons that indre and satisfie my conscience, That *uine, and all the Post-nati in Scotland* Reason, and by the Comm

England naturall borne subiects within the allegiance of the King of *England*; and inhabited to purchase and haue free-hould and inheritance of lands in *England*; and to bring reall actions for the same in *England*.

For, if they haue not this benefit by this blessed and happie Vnion, then are they in no better case in *England*, than the king of Spaines subiects borne in Spaine, &c. And so by this Vnion they haue gotten nothing: What they haue lost Iustice Yeluerton did well note.

And therefore I must giue Iudgement in the Chancerie, That the Defendants there ought to make direct answer to Ro. Caluines Bill for the Lands and Evidences for which he complaines.

T. Ellesmere Canc.

